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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 416

WILLIAM T. BURTON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HOMER CUMMINGS,
EDWARD H. MILLER,
JOHN B. HUFFAKER,
Washington, D. C.
HUGH M. WILKINSON,
WARREN O. COLEMAN,
New Orleans, Louisiana,
Counsel for Petitioner.

CUMMINGS, STANLEY, TRUITT & CROSS,
Washington, D. C.,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

William T. Burton, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on July 18, 1949, affirming the judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division entered May 24, 1948.

Opinions Below

The trial court filed no opinion. The opinion of the Court of Appeals (R. 2191) is reported in 175 F. 2d 960. The dis-

senting opinion of Circuit Judge Hutcheson on motion for rehearing (R. 2273) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered on July 18, 1949 (R. 2200). After obtaining an extension of time, until August 22, 1949 (R. 2200) petitioner filed a petition for rehearing (R. 2201) which was denied on September 23, 1949, Judge Hutcheson dissenting (R. 2278). The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1254(1). See also Rule 37(b) of the Federal Rules of Criminal Procedure, promulgated February 8, 1946.

Questions Presented

1. Whether, where in a trial on indictment charging conspiracy to influence the administration of justice in a court of the United States by means of bribery of a juror in a criminal case, the prosecution has on direct examination adduced the testimony of a petit juror that the accused juror voted for acquittal during the entire course of deliberation, the trial court's refusal to permit cross-examination questions as to how many other jurors also voted for acquittal is so arbitrary, erroneous in law and such abuse of the trial court's discretion as to deprive petitioner of his right to a fair trial.

2. Whether the trial court committed prejudicial error in excluding from evidence the offer by defendants of prior written statement of, and transcript of grand jury proceedings with respect to, a Government witness where such statement and transcripts, (a) were contradictory of his trial testimony, (b) disclosed his motive for changing his testimony to that given on the witness stand, and (c) showed duress and threats, amounting to "third degree" methods,

practiced on him to coerce his false testimony against petitioner.

3. Whether, having regard for the surrounding circumstances, it was prejudicial error depriving petitioner of his right to a fair trial to coerce the trial jury into rendering a verdict adverse to defendants by enforcing deliberations for over 72 hours and giving said jurors a version of the so-called "*Allen Case*" instruction.

4. Whether the duplicitous nature of the single count of an indictment charging (a) conspiracy to defraud in violation of Criminal Code, section 37, and (b) conspiracy to influence the administration of justice by affecting the verdict of a juror through bribery, a special type of conspiracy prescribed by section 136 of the Criminal Code was so prejudicial as to require dismissal of the indictment.

5. Whether the indictment is not required to be dismissed as merely charging a conspiracy to commit a subsequent offense which itself would require concert of action and plurality of agents.

Statutes Involved

The statutes involved are:

Criminal Code:

Section 37, 18 U. S. C. Sec. 88;
Section 135, 18 U. S. C. Sec. 241;
Section 136, 18 U. S. C. Sec. 242.

They appear in the Appendix, pp. 34-35.

Statement of Facts

Petitioner William T. Burton with three others was named defendant in an indictment in a single count filed January

3, 1946 under section 37 of the Criminal Code, 18 U. S. C. sec. 88 (1946) and charging conspiracy "to endeavor to influence, obstruct and impede and corruptly to influence, obstruct and impede the due administration of justice in a criminal prosecution * * *; and to defraud the United States of and concerning its governmental function of considering and deciding through the petit jury a criminal prosecution" originally brought against your petitioner and others for income tax evasion. Joe T. Cawthorn, Marcel F. LaBranche and James A. Noe were indicted as co-conspirators; Edwin H. Oliveira, Bernard R. Hughes and John J. Astorias were named as co-conspirators but were not indicted (R. 3).

The theory of the prosecution was that the conspiracy would accomplish its objective through jury tampering, including bribery. The theory of the defense was that only a routine jury investigation was made and that the defendants neither gave nor received bribes or engaged in any other unlawful conduct. The defendant Noe was acquitted but there was a verdict of guilty against the other three defendants, including your petitioner, who was sentenced to imprisonment for two years and to pay a fine of $10,000 (R. 2168, 2169, 2171).

Your petitioner had originally been indicted for income tax evasion on October 8, 1942 (R. 1456-1481) and the trial in July, 1943, resulted in a mistrial (R. 358). The petit jury panel for a second trial was drawn April 27, 1945 (R. 354), and qualified on May 21, 1945 (R. 355). Defendant Marcel F. LaBranche and unindicted co-conspirator Edwin H. Oliveira were members of this panel (R. 358, 359, 1486).

The evidence sought to prove that the alleged conspirators were guilty of four separate jury tampering attempts.

In pertinent substance, the evidence tended to show:

In one incident the defendant, James A. Noe, a former

Governor of Louisiana (R. 874) and friend of your petitioner (R. 1366), gave Bernard R. Hughes, an insurance agent, a note to cover the premium due on an insurance policy of Noe's (R. 795, 898) and that this debt was ultimately paid from a then contemplated loan from Burton to Noe (R. 1399). Between the date of the note and its payment Hughes contacted Henry E. Groffman, a talesman on the income tax fraud venire (R. 449). Hughes and Groffman discussed both business and the forthcoming Burton trial (R. 449-450). Groffman was excused as juror by both sides at the trial (R. 451). Since Noe was acquitted and no other defendant contacted Hughes or Groffman, the incident has now lost any significance.

Similarly, Noe had occasion to see Fred Dinghaus, a member of the jury at the second Burton tax trial (R. 453), during the trial when Dinghaus, whom Noe had known since 1941 (R. 454), went to see Noe about the illness of Noe's wife (R. 455). As with Hughes and Groffman, Noe was the only "conspirator" to see Dinghaus (R. 452-463) so that incident has also lost any significance.

Hughes P. Walmsley, who conducted a general insurance business in New Orleans (R. 463), testified that defendants Noe and Cawthorn saw him at his office in the latter part of May or early June, 1945 (R. 465). They inquired whether he knew any of the prospective jurors and he named eight or nine members of the panel (R. 466). He told them he didn't know any members well enough to talk to although he was told it would be to his interest if he would talk to the jurors (R. 466-467). Walmsley testified he saw Noe on one other occasion (R. 467), Cawthorn twice (R. 468) and your petitioner once (R. 471). His testimony at the trial to the effect that Noe and Cawthorn had sought to have him talk to some of the jurors (R. 466) was contradicted by his testimony at his first appearance before the grand jury (R. 1619) and before Agent Malone (R. 1617), in which he had completely

exonerated Noe (R. 1628), Cawthorn (R. 1618) and Burton (R. 1631-1632) of any improper advances toward him. These statements (R. 1617, 1619, 1633, 1635) were admitted in evidence (R. 535).

The defendant LaBranche was not involved in any way in these three incidents. However, Oliveira, a petit jury panel member, charged as a co-conspirator but not indicted, testified that, before the jury was chosen, he offered to split with LaBranche, another panel member, any bribe that could be secured if either was accepted as a juror for the Burton case (R. 558-561).

Oliveira testified that after he had been excused (R. 580) and LaBranche, who had been selected for the jury, had indicated acquiescence, he saw LaBranche again at a handbook shop (R. 559) the next evening, June 4, 1945 (R. 561). On June 5, he testified, he spoke to Cawthorn briefly on the street when he and Cawthorn met accidentally (R. 561). Afterward he saw LaBranche twice and Cawthorn twice more concerning securing a bribe. He testified that he saw your petitioner "one night" (R. 568) during the second week of the trial (R. 569) and the night after the trial (R. 571). Cawthorn (R. 1223) and Burton (R. 1383, 1384, 1425, 1426) deny these meetings took place and Oliveira's testimony is uncorroborated by other witnesses. Your petitioner's testimony as to his whereabouts at the time of the alleged meetings was supported by unimpeached witnesses (R. 1335, 1350). The same is true for defendant Cawthorn (R. 1024, 1029). Oliveira further testified that pursuant to arrangement with your petitioner he went to the Roosevelt Hotel with LaBranche to receive the bribe money from the supervising chef steward, J. J. Astorias (R. 573, 646). Although he did not see Astorias himself, LaBranche went back to see Astorias while he waited and returned with the money in a manila envelope (R. 594).

Astorias testified that your petitioner on the night after the trial (R. 647) left a package with him to give to a man named LeBlanc or LaBranche (R. 649) and that this package was called for by a man calling himself LeBlanc or LaBranche (R. 650). Astorias originally made a deposition to Federal agents (R. 1661) and testified before the grand jury completely exonerating all the defendants (R. 656, 1661, 1671), but completely changed his position after being threatened in the course of the grand jury proceeding, with prosecution for perjury (R. 1708) and income tax evasion (R. 1669, 1698) by the United States attorney and by grand jurors. The trial court sustained objection to the offer in evidence by the defense of the statement to the agents (Exhibit Defendant "Burton #1", R. 1661-1663) and of the grand jury minutes (Exhibit Defendant "Burton #2", R. 1664-1685; Exhibit Defendant "Burton #3", R. 1686-1725; Exhibit Defendant "Burton #4", R. 1725-1738). These were offered to impeach the witness Astorias (R. 1347, 1356) but the court held them inadmissible for lack of foundation (R. 1355).

After the Government had adduced the testimony of a co-juror that LaBranche had at the income tax trial of petitioner voted consistently for acquittal, the court sustained objection to cross-examination question as to how many other jurors had voted for acquittal (R. 545, 554).

On appeal from the judgment and sentence of the trial court, the court of appeals filed an opinion (R. 2191) and entered its judgment affirming the trial court (R. 2200).

Specifications of Error to Be Urged

The Court of Appeals erred:

1. In failing to hold that the trial court erred in restricting the cross-examination of the Government witness

Adams so as to prevent questioning as to how many other jurors voted for acquittal.

2. In failing to hold that the trial court erred in excluding the defense offer of the prior contradictory statement and transcripts of grand jury proceedings on appearance of the Government witness Astorias for the purpose of showing threats and intimidation tending to create bias and occasion the false testimony given by him on the trial.

3. In failing to hold that the trial court erred because under the surrounding circumstances the giving of the so-called "*Allen Case*" instruction virtually coerced a verdict against petitioner.

4. In failing to hold that the trial court erred in overruling petitioner's demurrer and motion to dismiss for duplicity of the indictment as charging in one count separate offenses of conspiracy covered by the general and by a special conspiracy statute, respectively.

5. In failing to hold that the trial court erred in overruling petitioner's motion for judgment of acquittal, or, in the alternative, a new trial, after the trial jury, by acquitting the co-defendant Noe, had eliminated from the case every factual element of alleged conspiracy except the alleged bribery of LaBranche, which because the offense of giving or receiving a bribe required agreement and plurality of parties, could not be made the subject of a conspiracy charge.[1]

Reasons for Granting the Writ

(1) The decision of the court below barring cross-examination as to jury balloting is in conflict with the deci-

[1] For purposes of brevity, this specification is not argued in this petition. If certiorari is granted, however, it will be urged in the brief of petitioner.

sion of this Court and so far sanctions departure from the accepted course of judicial proceedings as to require exercise of this Court's power of supervision.—The record in this case discloses imposition on the defense of a limitation on cross-examination so arbitrary as substantially to impair the right of confrontation and transcend the bounds of the recognized discretionary powers of the trial court with respect to cross-examination. The Court of Appeals has approved the trial court's ruling on the ground that it "was in accord with" *Clark* v. *United States*, 289 U. S. 1 (R. 2197).

The ruling of neither court may be reconciled with established rules of evidence, nor, so far as the question of privilege is involved, is it consonant with the decision in the *Clark* case.

The Government called as witness one Leon Adams, a member of the jury in the Burton tax trial (R. 544) who testified on direct that the defendant LaBranche, who had also served as a petit juror in the Burton tax trial (R. 544), had voted not guilty during "the entire course of the deliberations" (R. 545).

On cross-examination, asked "How many others voted for not guilty?" (R. 545), Adams was prevented from answering by objection of the Government, "That it is entirely irrelevant and immaterial what anybody else did." (R. 545). Counsel for the Government reaffirmed that privilege was out the window and relied on the asserted irrelevancy of what the other jurors did (R. 549). The Court ruled (R. 552):

> "I am convinced in my own mind that it is entirely irrelevant and it is immaterial how other jurors voted in this proceeding."

He stated (R. 553):

> "I simply intend to rule—and I won't rule until the jury returns—I simply state at this time that I

take it it will be improper to ask the witness how the balance of the jury voted in this case. I don't think it is proper. Now, I think counsel is going to abide by the court's ruling, and that is the only restriction I am placing on the cross-examination."

When the jury returned, the court made its formal ruling that the objection was sustained (R. 554). The court did permit the defense to evince from the witness that he did remember how at least eight of the jurors other than himself voted (R. 555) and that there were certain of these who changed their ballot after the first ballot (R. 555-556).

This erroneous ruling was highly prejudicial to Burton because the only evidence of any real substance against petitioner Burton was the testimony of Oliveira and Astorias as to the incident in which Oliveira as a fellow talesman with LaBranche allegedly conspired to solicit a bribe from Burton to influence LaBranche as a juror and obtained payment of the money in a package delivered to LaBranche by Astorias for Burton.

Oliveira's testimony tended to show that LaBranche, a juror, had been approached by Oliveira on the opening day of the trial, June 4, 1945, with the proposal that if either should be accepted on the jury they should work together to try to promote a bribe from the defendant Burton (R. 559); LaBranche was accepted (R. 559) and on June 5 on the street he saw Cawthorn, Burton's attorney, who asked him whether LaBranche could be trusted and would be interested in making some money (R. 562); that LaBranche objected to Cawthorn's offer of $1,000 and $500 for Oliveira (R. 563) and Cawthorn promised more (R. 568) but Burton told Oliveira $1,500 was the right amount (R. 569). Oliveira further testified that after the trial Burton told him to call on Astorias, the chef at the Roosevelt Hotel in New Orleans, for a package containing the money (R.

570); that after he had twice failed to obtain the package from Astorias (R. 571) as had LaBranche (R. 572) LaBranche went with him to the hotel, went to see Astorias and returned with the $1,500 in a manila envelope which he thereafter divided, giving $500 to Oliveira (R. 573, 594-595).

Astorias confirmed that Burton had given him a package and instructed him that a man named LeBlanc or LaBranche would ask for it wrapped in a newspaper and that he should give it to him (R. 649); that a man who looked like Oliveira asked for a package a few days later without giving his name and he refused him but he later delivered it to a man giving his name as LeBlanc or LaBranche when he asked for a package and stated that "it was wrapped in newspaper" (R. 650), and that later Burton thanked him (R. 651).

The credibility of Oliveira was greatly weakened by showing of his profession of race track tout and two divorces for adultery shortly after marriages (R. 596, 597, 599).

The credibility of Astorias was also greatly impaired by the fact that he had been accepting 5% kickbacks on his purchases as chef at the Roosevelt Hotel (R. 659-660), and had failed to report any of the income (R. 660). Although he had twice denied before the Grand Jury that he knew anything about this matter (R. 662, 656, 657) and before that had told the agents he didn't know LaBranche (R. 654) when the federal agents discovered he had $19,000 in a safe deposit box on much of which he had paid no income tax, he advised with his lawyers and testified before the Grand Jury in substance stated above (R. 662, 664). His identification of Oliveira was doubtful and apparently made because Oliveira told him he had gotten the package from him and gave him his name at the time that Oliveira was brought before him in the office of the federal agents (R. 666-667, 668-669).

Apparently, because of the serious impairment of the credibility of these, the only two witnesses, as to the alleged bribery of LaBranche, the Government chose first to present the testimony of juror Adams that LaBranche had voted for acquittal at Burton's trial (R. 544). Indeed, the Government conceded (R. 548):

> "Now, we are introducing this evidence as to LaBranche to further corroborate and link in all of our evidence that we are going to introduce before Your Honor in this case."

As a result of the trial court's action in cutting off cross-examination the defendants were prevented from showing that numerous other members of the jury in the income tax case had voted for acquittal (R. 2142, 2275).

The trial jurors here were thus left to conclude:

> (1) LaBranche voted consistently for Burton's acquittal.
>
> (2) LaBranche was the only one who did so vote for acquittal.
>
> (3) LaBranche voted in opposition to eleven other jurors and hence in opposition to the right verdict on consideration only of the merits of the case.
>
> (4) LaBranche, therefore, must have been motivated by some factor other than the merits—the bribe allegedly paid him.

Yet, despite the waiver and absence of privilege, clear relevance and obvious prejudice from the ruling sustaining objection to the cross-examination, the Court of Appeals merely held (R. 2197):

> "The ruling above recited was in accord with the *Clark* case."

The conflict with *Clark* v. *United States*, 289 U. S. 1, is shown by Judge Hutcheson in his dissent (R. 2276):

> "The *Clark* case, on which the court below relied, and on which our opinion was rested, does not support the ruling of the District Judge. It is to the contrary effect. In that case, as is shown by the opinion of the Circuit Court of Appeals, 61 Fed (2) at p. 698, the testimony disclosed not only how Mrs. Clark, but how the other jurors, had voted. • • •
>
> "If then we look alone to the *Clark* case, we find it direct authority for admitting proof as to how the other jurors voted."

As stated in *Clark* v. *United States*, 289 U. S. 1, 14:

> "There must be a showing of a *prima facia* case sufficient to satisfy the judge that the light should be let in. Upon that showing being made, the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would exist without them."

Departure from the usual course of judicial proceedings is also plain. In *Sneed* v. *United States*, 298 Fed. 911 (5th Cir. 1924), cert. denied, 265 U. S. 590, it is stated that the jurors' conduct in a jury bribery case is admissible to illustrate the conspiracy scope and to trace its full history. There the votes of all jurors were shown. In *State* v. *Serpas*, 188 La. 1074, the court expressly recognized the relevance of the votes of the jury in the trial of a juror for perjury on his *voir dire*.

Once the Government had introduced its evidence as to LaBranche's vote, the relevance of evidence of the number of other votes for acquittal was plain. *Harrington* v. *United States*, 267 Fed. 97; *State* v. *Isensee*, 64 N. D. 1 (1933); *State* v. *Rutledge*, 135 Iowa 581; *Pitman* v. *State*, 148 Ala. 612; *Goforth* v. *State*, 183 Ala. 66; *Hudson* v. *State*, 217

Ala. 479; *Commonwealth* v. *Goldberg,* 212 Mass. 88; *Walters* v. *State,* 17 Tex. Cr. App. 226. As stated in *Underhill on Criminal Evidence,* Sec. 12:

> "One fundamental rule is that each party has a right to introduce relevant testimony to contradict, explain, or *minimize* the effect of adverse evidence."

Obviously, evidence on cross-examination that all but one of the other jurors on the hung jury had voted with the accused LaBranche for acquittal or even, as here, that seven of the others, making eight in all, had voted for acquittal (R. 2142, 2275) would serve greatly to minimize the adverse corroborative inference, supplementing and confirming the Government's case, that undoubtedly was drawn from the testimony of Adams that LaBranche had voted for acquittal.

Of course, the *extent* of cross-examination rests in the sound discretion of the trial judge, *Alford* v. *United States,* 282 U. S. 687, 694; *District of Columbia* v. *Clawans,* 300 U. S. 617, 632, but cross-examination of a witness is a matter of right, not privilege. *The Ottawa,* 3 Wall. 268, 271; *Alford* v. *United States, supra,* p. 691. And it is only after a party has had an opportunity substantially to exercise the right that discretion becomes operative. *Lindsey* v. *United States,* 77 U. S. App. D. C. 1, 133 F. 2d 368, 369; *E. Hanger, Inc.* v. *United States,* 81 U. S. App. D. C. 408, 160 F. 2d 8, 10. It is proper to permit upon cross-examination, the bringing out of anything tending to contradict, modify or explain the testimony given by a witness. *Mintz* v. *Premier Cab Association,* 75 App. D. C. 389, 127 F. 2d 744; *Atlantic Greyhound Lines* v. *Isabelle,* 81 App. D. C. 221, 157 F. 2d 260 (1946). When direct examination discloses only such parts of the transaction as are favorable to the party for whom testimony is given, the full details may be inquired into on cross-examination. *Banning* v. *United States,* 130 F. 2d 330 (C.C.A. 6th 1942) cert. denied 317 U. S. 695

(1943); *Haase* v. *Chicago, M. St. P. & P. R. Co.*, 76 F. Supp. 393 (Minn. 1948).

The summary denial of the right of cross-examination here, unless corrected by this court, will deny a substantial right to the accused and withdraw one of the safeguards essential to a fair trial.

Judge Hutcheson, in his dissent, states (R. 2277):

> "Indeed, to permit the Government, as was done here, to offer a witness and then to deny defendant reasonable cross-examination of that witness is contrary to common fairness as understood by every standard of American justice and due process of law."

This but applies the holding of this Court in *Alford* v. *United States*, 282 U. S. 687, 692:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place a witness in his proper setting *and put the weight of his testimony* and his credibility *to a test*, without which the jury cannot fairly appraise them." (Emphasis supplied.)

This clear error of the court below and its conflict with the applicable decisions of this Court require issuance of the writ.

2. **The decision of the court of appeals in upholding exclusion of evidence of a prior sworn statement by, and of transcripts of grand jury proceedings on appearances of, Government witness Astorias is in conflict with decision of the Second Circuit.**——At the trial Astorias, the Roosevelt Hotel chef, on direct examination by the Government

testified that Burton had given him a package for delivery to LaBranche, that Oliveira, not positively identified by him (R. 669), had called for a package and that LaBranche, or a man who looked like him (R. 675), had called for the package and been given it by him (R. 645-652). Later Burton offered in evidence (R. 1348, 1355) Exhibits marked as:

> "No. 1." Written statement of John Joseph Astorias dated, subscribed and sworn to before Special Intelligence Unit Agent Peyroux on September 21, 1945. This statement completely and entirely exonerated petitioner Burton (R. 1661).
>
> "No. 2." Transcript of testimony of Astorias before the Grand Jury on September 21, 1945 (R. 1664-1685).
>
> "No. 3." Transcript of testimony of Astorias before the Grand Jury October 16, 1945 (R. 1686-1725).
>
> "No. 4." Transcript of testimony of Astorias before the Grand Jury undated (R. 1725-1738).

Having earlier been identified (R. 695-696), these were offered in evidence (R. 1356)[2] to impeach the witness by:

(1) Showing self-contradiction by the witness, i.e., his earlier statements, contrary to his trial testimony, completely exculpating petitioner Burton.

(2) Showing repeated threats appearing in the grand jury proceeding transcripts as objective circumstances and tending to create bias, i.e., fear of punishment for perjury and for his own infractions of the income tax law.

The trial court ruled (R. 1355):

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[2] The portions of the Grand Jury testimony particularly intended to be shown to the jury were pointed out in a memorandum handed to the United States Attorney (Burton Ex. X, (R. 1796-1801)) and referred to in, and made a part of, the offer (R. 1357).

". . . a witness cannot be discredited or his hostility or bias shown by proving statements made by him outside the Court which do not harmonize with the statements made by him on the witness stand until his attention has been called specifically to the former statements, with particularity as to time, place and circumstance, so that he can deny or explain them."[3]

The court of appeals (R. 2197-2198):

(a) Held that prior statements of the witness when offered for purposes of impeachment either as showing inconsistencies or as showing bias or feeling are, as held by the trial court, inadmissible because no foundation laid;

(b) Recognized the inadequacy of the stated rule to justify exclusion of the grand jury transcripts as proof of objective circumstances tending to create bias resulting from threats of prosecution for income tax fraud and perjury (R. 2198). This type of evidence, of course, does not require the laying of a foundation. *United States* v. *Schindler,* 10 Fed. 547, 549 (C.C.S.D.N.Y., 1880); *Hoagland* v. *Canfield,* 160 Fed. 146, 170-171 (C.C.S.D.N.Y., 1908); *Ewing* v. *United States,* 135 F. 2d 638 640 (App. D. C. 1942), cert. denied 318 U. S. 776; 3 *Wigmore on Evidence* (3d ed.) Secs. 948, 953, p. 514, note 2; 3 *Jones, Evidence,* (4th ed.) secs. 828, 845.

But the court of appeals affirmed on the ground that the admissions of the witness had already put in evidence all that the documents would tend to show with respect to bias (R. 2198). It also added that the offer had not been clearly expressed to be for this purpose and that in any event the error was not reversible error. (R. 2198).

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[3] This ruling, confined to utterances of the witness, does not purport to cover the offer of proof to show the fact of threats of prosecution for perjury in the witness' testimony as to accumulations in his safety deposit box, duress, coercion or promise of reward as reason for bias. These clearly appeared in the transcript of his second grand jury appearance (R. 1690, 1693, 1694, 1695, 1698, 1700, 1704, 1707, 1714, 1715, 1717, 1724).

The court's holding is ill founded in fact and in law.[4]

The proffered evidence of bias was not covered by the testimony of the witness. The court's holding is ill founded in fact because the testimony of Astorias did not, as the court states, put in evidence all that the grand jury transcripts, as evidence of objective circumstances indicating bias, would tend to show in the way of threats, intimidation and fear of prosecution.

On his first Grand Jury appearance, September 21, 1945, (R. 1664) it was brought out that Astorias had a vault box

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[4] We do not propose now to urge at length the additional error in the holding of the trial court and of the court of appeals that, insofar as they were offered as evidence of self-contradiction and of utterances of the witness indicating bias, the statement to the Special Agent (Burton Exhibit 1) and the transcript of Astorias' Grand Jury appearances (Burton's Exhibits 2, 3, 4) were inadmissible for lack of ~~evidence~~ foundation.

The ruling proceeded on an erroneous premise because adequate foundation was laid. As to Burton's Exhibit No. 1 (the statement to the agents which completely exculpated Burton (R. 1661)), the courts below ignored the record showing that specifically the contradiction was pointed out to him (R. 653, 654). Furthermore, the statement to the agents showing the date and the agent before whom it was given, was handed to Astorias on cross-examination and a paragraph in which he particularly denied holding any funds for Burton was called to his attention with the oral inquiry whether he had made that statement (R. 696-697). He admitted that in his first Grand Jury appearance he had said he had no conversation with Burton (R. 657) and that in his first and second appearances before the Grand Jury he said he knew nothing about the Burton matter (R. 662). This was all that was necessary by way of foundation for the exhibits offered to show self-contradiction. *United States* v. *Dilliard*, 101 F. 2d 829, 837 (2d. Cir. 1938) cert. denied 306 U. S. 635.

Transcripts of the grand jury appearances of Astorias also includes utterances by the witness indicating feeling that he was under pressure. He said that the grand jury proceeding was "trying to make" him say he knew something about the *Burton* case (R. 1677), that he was "like crazy" for the last three weeks (R. 1713), that he was worried (R. 1714) and was under considerable nervous strain (R. 1726). As a matter of law, even as to utterances showing bias, laying of foundation for admission of these, as they appeared in the grand jury proceedings transcripts, by oral inquiry directing the witness' special attention thereto was unnecessary under *United States* v. *Schindler*, 10 Fed. 547, 549 (C. C. S. D. N. Y. 1880); *Hoaglund* v. *Canfield*, 160 Fed. 146, 170 (C. C. S. D. N. Y. 1908); see *Ewing* v. *United States*, 135 F. 2d 633. 640 (App. D. C. 1942).

containing $19,000 (R. 1668-1670) creating the suspicion that he had obtained it from Burton (R. 1670). He asserted that he had put the $19,000 in the box in March, 1945 when he first obtained the box (R. 1676) and had not entered it since that date until two days before his appearance before the Grand Jury (R. 1671, 1676).

The transcript of his second Grand Jury appearance, October 16, 1945 (R. 1686) shows that as a result of the disbelief expressed by the United States attorney in his first appearance (R. 1678, 1679), Astorias had acceded to a request for examination of his box by federal agents (R. 1687). This showed that the money found therein had not been issued by the Treasury until April or July, 1945 (R. 1689-1690). When he, nevertheless, insisted that he had put all of the money in the box in March, he was subjected to a series of threats of perjury prosecution (R. 1690, 1693, 1694, 1700). Jurors repeatedly told him he was lying (R. 1690, 1694) and warned him of the severity of the penalty for perjury (R. 1694).

He volunteered the fact that he had talked to a grand juror privately (R. 1706) and a juror again threatened him with loss of freedom for his perjury and when he insisted that his contact with the single grand juror was innocent he was told that he was in a vulnerable position and that the facts given were false (R. 1715).[5]

The transcript of the third Grand Jury appearance of Astorias shows his statement that he had paid the income tax on his unreported income through kick-backs on purchases made by him as chef at the Roosevelt Hotel (R. 1732, 1733, 1737) but had not yet paid penalties and fine (R. 1737), with which, inferentially, he must have been threatened. At the trial he testified that he had paid income tax on $12,500.[6] income over a period of four years from 1945,

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[5] The pertinent portion of this transcript is set out in the Appendix, pp. 36-38.

[6] Apparently only $12,500 of the total of $19,000. was regarded as representing income on which, because not reported, tax had not been paid in his regular annual returns (R. 1701, 1721).

"and they must have accepted it because I never heard from them" (R. 678). This would have shown that he was thus in a position to hope that if he remained in the good graces of the Government, this would be regarded as a settlement (R. 678).

The Grand Jury transcripts were obviously highly important as showing basis for a belief or hope on the part of the witness that in return for his trial testimony he might secure immunity from prosecution for perjury as to the source and date of deposit of money in his box and immunity from penalty, criminal and civil, for failing to report or pay income taxes on his kick-back receipts, even though it might be urged that there was no basis in fact for such hope in any act or word of the United States attorney. *Farkas* v. *United States*, 2 F. 2d 644, 647 (6th Cir., 1924); *United States* v. *Beekman*, 155 F. 2d 580, 584 (2d Cir., 1946); *Sandroff* v. *United States*, 158 F. 2d 623, 628, 629 (6th Cir., 1946).

The court of appeals asserts that there was "already in evidence without contradiction all that these lengthy documents would tend to show on this line" (R. 2198). But the record shows the court wrong. In the first place, its summary of the witness' trial testimony (R. 2198) does not even purport to cover fear of perjury indictment which might reasonably have been inferred by the jury to have been instilled in the witness as a result of the numerous threats. Furthermore, contrary to the court's statement, Astorias in his testimony specifically denied fear of prosecution for income tax law violation or perjury (R. 664, 666):

> "Q. You were scared you were going to be indicted. A. No, sir, but I was scared I was going to be mixed up in something and I never mix up in anything. Q. You were scared you were going to be indicted about three things. One, income tax evasion. A. No, sir, I wasn't. Q. You were afraid you might be indicted for talking

to a grand juror outside of the grand jury room? A. No, sir, I am not afraid. That's the God's truth.

R. 666:

Q. You thought you were going to be indicted? A. No, sir, I didn't think I was going to be indicted."

Before the trial jury Astorias assumed the attitude of a wronged innocent man, claiming he did not know he owed income taxes (R. 679), and that he thought the payer of the kick-backs was paying the taxes thereon (R. 663). Indeed, he persisted in seeking to characterize the kick-backs as legitimate commissions. His trial testimony, therefore, fell far short of establishing the facts that would be shown by the grand jury testimony transcripts.

The court erred as a matter of law. Even if the court of appeals were right in its conclusion that everything shown by the grand jury transcripts was already in evidence (and the court is plainly in error on that) still the conclusion that this would justify exclusion of those documents is erroneous as a matter of law. For the purpose of showing bias, i.e., threats and intimidation of the witness by objective circumstances, the transcripts of the grand jury testimony, particularly the second and third (Burton's Exhibits 3 and 4) were properly admissible even if what would thus be shown had been conceded by the witness.

As stated in 3 *Wigmore on Evidence,* Sec. 948 and note 3:

"This class of facts, then, may be offered either by intrinsic testimony or by cross-examination without discrimination against the former. It has been said that where the witness in general *admits the existence of bias,* no further inquiry into circumstances will be allowed, either on cross-examination or otherwise; the notion being that it is a waste of time to allow a further attempt to prove a thing already conceded. * * * But this view is unsound; because a general admission of the existence of bias can never be so vivid

and forceful as the inference from his situation[7] or utterances."

A further reason for this rule, well exemplified in the instant case, appears in the explanation of the same rule when applied to cases of self-contradiction. (3 *Wigmore on Evidence,* (3d ed.) Sec. 1037, p. 723):

> "Even where the witness *admits* having made the other statement, this does not prevent the opponent from offering it in evidence by his own witnesses; for he may prefer to have it clearly brought out and emphasized, and it would be unfair to restrict him to the unemphatic mode of proving it by the witness' admission and to subject him to the necessity of disputing whether the admission has been full and exact."

Conflict with the Second Circuit is apparent in *United States* v. *Krulewitch,* 145 F. 2d 76, 79. There, as here, it was contended that the exclusion, on offer by the defense, of the witness' prior contradictory statement to a government agent worked no harm because of the admission of the witness that such statement was false. Judge Learned Hand, writing for the court and recognizing the rule set forth in Wigmore, held (p. 79):

> "Moreover, although Joyce on her cross-examination swore that the statement she had given the agent was

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[7] It was especially important for the jury to know the exact manner in which Astorias was subjected to threats and pressure tending to adversely affect his sense of continuing moral duty to speak truly. The grand jury testimony would have shown that. By way of illustration, suppose that instead of frightening Astorias before the grand jury someone had pointed a gun at his head and told him that if he did not testify as he was expected, he would be shot. If such evidence were offered to show the fear motive of the witness in testifying, no court would dream of excluding it. Yet, where is the difference in legal principle between that case and this one? We can perceive none. See *Ewing* v. *United States,* 135 F. 2d 633, 640, cert. denied 318 U. S. 776; *Underhill's Criminal Evidence* (4th ed.) Sec. 437; *United States* v. *Beekman,* 155 F. 2d 580, 584; *Majestic* v. *Louisville & N. R. Co.,* 147 F. 2d 621, 627; *Meeks* v. *United States,* 163 F. 2d 598; 70 C. J. p. 769, Sec. 934.

false throughout, *such testimony has never been regarded as an equivalent of the contradictory statement* itself. *People* v. *Schainuck*, 286 N. Y. 161, 165, 36 N. E. 2d 94; *Wigmore* § 1037. That it should not be in the case at bar a perusal of the document amply proves. Finally, we cannot disregard the error. • • • Joyce herself was shown to be in the last degree untrustworthy; and we surely cannot say that this circumstantial story so totally at variance with her testimony, might not have created enough doubt to turn the scales in favor of the accused." (Emphasis supplied.)

Proffer of the grand jury proceedings clearly showed purpose to introduce it as proof of objective circumstances of duress and threats creating bias in the witness.— The grand jury proceedings transcripts identified by stipulation (R. 695-696), were offered for the purpose of showing that the witness was motivated by threats of duress and coercion and hope of reward in the form of freedom from prosecution (R. 1347-1348, 1355-1356). The purpose was expressly stated to be (R. 1356):

> "to show the state of mind of the witness and his motive in testifying • • • ".

Counsel were afforded opportunity to submit the offer in a more concrete form (R. 1348) and in connection therewith handed a memorandum to the prosecuting attorney in which they specifically quoted excerpts from the transcript of grand jury testimony of October 16, 1945, showing pressure by way of threats and urged that it was "admissible to show that the witness testified under duress, and as a result of fear, and consequently that he is motivated and biased." (R. 1796, 1797). Specific reference to this memorandum (Burton's Exhibit X) was made in the offer of the evidence to the court (R. 1356). While the court's ruling (R. 1355) deals only with offers showing bias by utterances of the witness himself, it is, therefore, clear that, contrary to the intimations in the opinion of the court of appeals (R.

2198), it was specifically brought to the trial court's attention that the offer also included proof of bias as a result of objective circumstances.

It is apparent that the court below has so far sanctioned departure from the usual course of judicial proceedings and so far limited the defendant's right to a fair trial in a way and on a point so plainly in conflict with decisions of another circuit as to require the exercise of jurisdiction of this Court.

3. **Under the surrounding circumstances, the error of the court below in approving use of the Allen instructions as a supplemental charge, deprived petitioner of his right to a fair trial.**——The charge approved by this court in *Allen* v. *United States*, 164 U. S. 492, 501, is so coercive in its nature that, while possibly permissible standing alone, in the light of the peculiar set of facts making up the setting in which it was here given, it deprived petitioner of his right to a verdict based on the facts and law properly before the jury.

Consideration of the history of this case makes clear the prejudice resultant from the court's action.

The jury retired to deliberate on Saturday, May 15, 1948 at 10:53 A. M. (R. 284). After being out for more than 25 hours they were recalled on Sunday noon (R. 1453). Informed they had not reached a verdict, Judge Borah gave as supplemental instructions those from *Commonwealth* v. *Tuey*, 8 Cush. (Mass.) 1, approved by this court in *Allen* v. *United States*, 164 U. S. 492 (R. 1451-1455). Thereafter the jury was kept incommunicado without further inquiry from the court until Tuesday morning, May 18, an additional 48 hours, or a total of 72 hours, at which time they finally returned a verdict of guilty against the defendants Eurton, Cawthorn and LaBranche but acquitted on the verdict of not guilty with respect to defendant Noe (R. 284-287).

The charge itself, of course, has been frequently criticized for its coercive nature. The effect thereof was greatly increased by the atmosphere peculiar to this trial:

a. Each juror had by the very trial of the case before him necessarily been impressed with the fact that in the event of a disagreement there was definite possibility that he and his vote might be the subject of investigation.

b. The apparent probability of investigation in the event of disagreement was greatly increased by the fact that a government witness asserted that the same Judge Borah had, as a result of disagreement in the prior Burton income tax case, directed the investigation which culminated in this trial (R. 536). This intimation of the Judge's probable belief as to the guilt of the defendants, resulting from the jurors' knowledge through the trial testimony (R. 536) that Judge Borah, more in the roll of prosecutor than judge, had initiated the investigation, was of course, highly prejudicial to the petitioner.

c. Each juror had been made keenly aware that in case of investigation, if his ballot were recorded for acquittal, he would be unable to justify or support such a vote by showing that others had so voted with him, for the court had expressly sustained objection that the vote of others would in such case be irrelevant and immaterial (R. 545, 554).

In approving the supplemental instruction, the court of appeals merely considered the *Allen* case standing alone (R. 2198-2199). It is established of course that the court has discretion to give supplemental instructions and the time during which the jurors will be required to deliberate is also discretionary with the court. However, exercise, in the same case, of the court's discretion in both respects to the extreme bounds of that discretion in each, occurring as it did in this case, constitutes an abuse of discretion because of the

resultant coercion. A juror was himself on trial and one of the items of proof was that he voted for acquittal. This in itself was well calculated to make any but the most exceptionally courageous juror hesitate to oppose the will of the judge who had instigated the investigation culminating in the prosecution and had in the supplemental instructions in effect told the minority that they should yield to the majority.

The trial court also gave the additional instruction (R. 1454):

> "You should consider that the case must at some time be decided, that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so."

Instruction that the case must "some time be decided" and that "there is no reason to suppose that the case will ever be submitted to twelve men more intelligent * * * or that more or clearer evidence will be produced on the one side or the other", aside from its fallacy [8] introduced to each juror considerations at war with the juror's oath that the only consideration entering into his verdict would be the law and the evidence.

As was said in a case in which the jury stood 11-1 for conviction after 38 hours, and was given supplemental instructions (*Burton* v. *United States*, 196 U. S. 283, 307):

> "Balanced as the case was in the minds of some of the jurors, doubts existing as to defendant's guilt in the

[8] Certainly after two mistrials the United States Attorney would be free to conclude that he did not have a case and dismiss the indictment. As to additional evidence, the testimony of defendant's important witness Hughes (R. 536) might very well become available on a new trial.

> mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. * * * *A slight thing may have turned the balance against the accused* * * * (Emphasis supplied.)

As noted in *Nick* v. *United States*, 122 F. 2d 660, 674:

> "If such statement [of the so called Allen instructions] is made in the face of an existing disagreement in the jury it is quite evident that its entire force would be felt as applying to an existing situation which had developed. Language which might be innocent if uttered before submission of the case to the jury might be regarded as harmful if applied to a specific existing disagreement. Here the caution was given as part of the charge before submission."

Here after 25 hours deliberation the emphasis in the supplemental instruction tended to minimize the importance of establishing guilt beyond a reasonable doubt, omitted renewed reference to the presumption of innocence (cf. *Berger* v. *United States*, 62 F. 2d 438, 440 (10th Cir., 1932)) and emphasized that the case would have to be decided by these jurors or some others no better fitted than they.

Applicable here is the language in *Peterson* v. *United States*, 213 Fed. 920, 925, where the charge differed from that here involved, not in principle but only in degree:

> "It is to be borne in mind that nowhere did the court make it clear that, however desirable it might be to avoid another mistrial and finally to terminate the prosecution, an agreement should not be reached in violation of the honest conviction of any one of the jurors. * * * No obligation rested upon it to make any further expenditure, for, in case of a mistrial, it would have been the right, if not the duty, of the prosecuting officers to dismiss the prosecution. * * * Can there be any question that, retiring with the impression that the all-important thing was a final disposition of the case, the

jurors consciously or unconsciously bartered the acquittal of one defendant for the conviction of the other?"

Harassed by the unspoken fears that must necessarily have been engendered by the nature of this case and Judge Borah's role as instigator of the investigation, such of the jurors as might otherwise have continued to entertain an honest belief that the Government's case had not been made out, were obviously subjected to an unfair and highly coercive pressure which could only serve to deprive the petitioner of the protection against consideration of extraneous factors essential to the preservation of his right to a fair trial.

4. **The indictment should have been dismissed for duplicity.**—The indictment (R. 3-11) charges (R. 4) that petitioners, indicted, together with Edwin H. Oliveira, Bernard R. Hughes and John Joseph Astorias, alleged co-conspirators not indicted, conspired:

(a) "to commit offenses against the United States of America, that is to say: corruptly to endeavor to influence, obstruct and impede, and corruptly to influence, obstruct and impede the due administration of justice",[9] and

(b) "to defraud the United States of and concerning its governmental function of considering and deciding through the petit jury * * * a criminal prosecution * * * and of and concerning its right to the conscientious, faithful, disinterested and unbiased judgment and determination of the petit jury." The indictment cited section 37 of the Criminal Code, 18 U.S.C., sec. 88 (1940), the general conspiracy statute (R. 11).[10]

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[9] This substantive offense is in the language of Section 135 of the Criminal Code, 18 U. S. C., Sec. 241 (1940), *infra*, p. 34.

[10] The facts alleged, and not the statute cited by the pleading, of course, determine the legal force of the averments. *Williams* v. *United States*, 168 U. S. 382, 389; *Outlaw* v. *United States*, 81 F. 2d 805, 806.

However, this overlooked that conspiracy to commit the substantive offense specified in 18 U.S.C., sec. 241 (1940) at least insofar as that offense embraces the influencing of the verdict of the petit juror is treated as a special type of conspiracy, specially proscribed and punished by 18 U.S.C., sec. 242 (1940):

> "If two or more persons conspire * * * to influence the verdict * * * of any * * * petit juror * * * each of such persons shall be fined not more than $5,000 or imprisoned not more than six years or both."

The specific application of this special conspiracy statute to the substantive offenses enumerated in Criminal Code, sec. 135, 18 U.S.C., sec. 241 was made even more clear by its amendment, during the period of the alleged conspiracy,[11] and during the progress of the income tax trial of Burton in which a juror was allegedly bribed, by Act of June 8, 1945, c. 178, 59 Stat. 234, to provide:

> "If two or more persons conspire to violate any provision of Section 135 [18 U.S.C. Sec. 241 (1940)] or 135a of the Criminal Code as amended, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished in like manner as provided by Section 135 and 135a of the Criminal Code, as amended (repealed by Act of June 25, 1948, sec. 21, c. 245, Pub. No. 772, 80th Cong.)"

The general charging part of the indictment, aside from charging the offense in language of 18 U.S.C., sec. 88 (1940), does little more than allege in the abstract that the conspiracy was corruptly "to *endeavor* to influence, obstruct and impede the due administration of justice" and "to influence, obstruct and impede the due administration of justice." (emphasis supplied) It can hardly be argued

[11] The indictment alleges the conspiracy continued from October 8, 1942 to the date of the indictment, January 3, 1946 (R. 4, 11).

that this part of the indictment is sufficiently definite to inform petitioner of the charge against him or sufficient to enable him to avail himself of the protection against double jeopardy. *United States* v. *Cruikshank,* 92 U. S. 542, 558. Since it states no facts which may properly be regarded as describing or defining the offense itself, this portion of the charge, if standing alone, would be fatally defective. *Asgill* v. *United States,* 60 F. 2d 780, 783-785. As held in *United States* v. *Hess,* 124 U. S. 483, 487:

> "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

For this reason, the Government must, therefore, rely on the second part of the indictment following "in the manner and by the means" (R. 5) in order to maintain that the indictment sufficiently charges a crime at all. *Browne* v. *United States,* 145 Fed. 1, 5-6 (2d Cir., 1905); *Joyce on Indictments* (2d ed.) Sec. 307, p. 314.

Here, everything alleged against all of the defendants had as its objective, if a fact, the influencing of the verdict of a juror whether the influence was applied to Dinghaus, Groffman, LaBranche, or through Walmsley or some other juror or jurors.

Duplicity results from the fact that the indictment in one count charges two separate offenses (a) conspiracy to defraud the United States, as denounced by Section 37, Criminal Code, 18 U.S.C., sec. 88 (1940), and (b) conspiracy to influence the verdict of a petit jury (which was all the instant case pretended to be about), and nothing else.

Demurrer and motion to dismiss was based on this ground (R. 21-22) argued on behalf of petitioner (R. 51) and denied (R. 112).

The court of appeals relies on the presence of the word "endeavor" in Sec. 135 and in the indictment and on its absence from Sec. 136 (R. 2193). But this overlooks that combination is the gist of the offense. It must always be borne in mind that in the case at bar the juror LaBranche, who actually sat on the trial, and participated in the deliberations toward the verdict, sought by the prosecution to be proved to have been actually influenced to the end that it could not be reached, was made one of the defendants, was indicted, convicted, and is now one of the appellants. We mention this in order to distinguish from certain cases wherein there was no prosecution of the jurors involved. This was an alleged completed juror-bribery, with the alleged juror-acceptor of the bribe accused as one of the defendant conspirators. Certainly, it cannot reasonably be argued that in connection with a single combination an accused could be tried and sentenced, first, for conspiracy to influence verdict of a juror in violation of 18 U.S.C., sec. 242 (1940) and later for conspiracy to endeavor to influence a petit juror in violation of 18 U.S.C., secs. 37 and 241 (1940).

Even if it be granted that Section 37 and Section 135 of the Criminal Code (18 U.S.C., secs. 88, 241 (1940)) on which the indictment is predicated, are broad enough in their terms to cover the conspiracy here alleged, Section 136 of the Criminal Code constitutes the specific direction of Congress for the punishment of all conspiracies to influence the verdict of a petit juror. The fact that no overt act was necessary and that the authorized penalties were much greater than under Section 37 fortifies the conclusion that under the maxim "*generalia specialibus non derogant*" the specific provision as to conspiracy of the special type must be deemed to apply. *Haywood* v. *United States,* 268 Fed. 795, 799 (C.C.A. 7, 1920).

The decision below is in conflict with the principles enumerated in *American Tobacco Co.* v. *United States,* 328 U. S. 781, 788; *Enfield* v. *United States,* 261 Fed. 141, 142.

Conclusion

Petitioner has clearly been deprived of his right to a fair trial. The trial court's refusal of the right to cross-examine as to existence of votes for acquittal by jurors other than accused must shock even the biased, not to mention the impartial, in its callous disregard of the defendants' rights.

The decision of this Court in the *Clark* case has been perverted to impair one of the fundamental elements essential to protection of the individual against arbitrary criminal accusations by the State. It could serve only to impress all the jurors with the basic unfairness of our criminal procedure. As Judge Hutcheson stated in the dissent (R. 2277):

> "Indeed, to permit the Government, as was done here, to offer a witness and then to deny defendant reasonable cross-examination of that witness is contrary to common fairness as understood by every standard of American justice and due process of law . . . not merely harmless, but highly prejudicial error. * * *"

The court below has also approved departure from the recognized right of a party to show probable extent and effect of bias of a witness by evidence of objective circumstances even after the witness has admitted bias and facts causing it.

The excess of the limits of proper judicial pressure to procure a verdict also presents a grave question of general importance.

Unless the supervisory power of this Court is exercised, vital errors of the trial court will be permitted unjustly to deprive petitioner of his liberty.

WHEREFORE, it is submitted that this Petition for Writ of Certiorari should be granted.

Respectfully,

HOMER CUMMINGS,
EDWARD H. MILLER,
JOHN B. HUFFAKER,
Washington, D.C.
HUGH M. WILKINSON,
WARREN O. COLEMAN,
New Orleans, La.,
Counsel for Petitioners.

CUMMINGS, STANLEY, TRUITT & CROSS,
Of Counsel.

October 1949.

APPENDIX

The pertinent statutory provisions are as follows:

Criminal Code, sec. 37, 18 U. S. C. sec. 88 (1946):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than two years, or both.

Criminal Code, sec. 135, 18 U. S. C. sec. 241 (1940), before amendment by Act of June 8, 1945, c. 178, 59 Stat. 234:[1]

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court

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[1] By Act of June 8, 1945, c. 178, 59 Stat. 234, sec. 135 was amended to provide (18 U. S. C. sec. 241 (1946)):

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any party or witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, or who shall injure any party or witness in his person or property on account of his attending or having attended such court or examination before such commissioner or officer, or on account of his testifying or having testified to any matter pending therein, or who shall injure any such grand or petit juror in his person or property on account of any verdict, presentment, or indictment assented to by him, or on account of his being or having been such juror, or who shall injure any such commissioner or officer in his person or property on account of the performance of his official duties, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Criminal Code, sec. 136, 18 U. S. C. sec. 242 (1940) before amendment by Act of June 8, 1945, c. 178, 59 Stat. 234[2]:

If two or more persons conspire to deter by force, intimidation, or threat, any party or witness in any court of the United States, or in any examination before a United States commissioner or officer acting as such commissioner, from attending such court or examination, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, each of such persons shall be fined not more than $5,000 or imprisoned not more than six years, or both.

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[2] By Act of June 8, 1945, c. 178, 59 Stat. 234, section 136 was amended to provide (18 U. S. C. sec. 242 (1946)):

"If two or more persons conspire to violate any provision of section 135 or 135a of the Criminal Code, as amended, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished in like manner as provided by sections 135 and 135a of the Criminal Code, as amended." (Repealed by Act of June 25, 1948, c. 645, Pub. No. 772, 80th Cong.)

EXCERPTS FROM GRAND JURY MINUTES

The following excerpts from the transcript of the grand jury proceedings on Astorias' second appearance before it, October 16, 1945 (R. 1686) exemplify the numerous threats and intimidation to which he was subjected.

(R. 1690) By Mr. Christenberry:

Q. You understand the penalty for perjury?
A. Yes sir.
Q. You understand if you swear falsely you can be prosecuted for perjury?
A. I am not swearing falsely.

(Later on the same page):

Q. How could the money be in the box in March when it wasn't issued in Washington until July?
A. I don't know.

By a Juror: That's a *definite lie* (emphasis ours).

(T. 1693) By Mr. Christenberry:

Q. Listen, you're under oath and *you have lied enough*, you're taking up the time of this jury and I'm telling you perfectly frankly and plainly. We have reached the point where we're wasting time with you (emphasis ours).

(T. 1694) By a Juror:

Q. I think you ought to tell the truth; we've got so much evidence. The bills weren't issued until July and you didn't go in the bank box until March.
A. March 10.
Q. *That's a definite lie.* (Emphasis ours.)

(Later on same page)

By a Juror:

Q. You are getting yourself so much involved in this thing, *there's not going to be any alternative.* If you continue this, these gentlemen are convinced that your story, by and through the fact there can't be a mistake that a cer-

tain portion of your money was not put into circulation until July of this year and if you say that you put that sum of money that wasn't in circulation, you say you put that money in your box in March?

A. In March.

Q. It can't be. These gentlemen are intelligent, these gentlemen know that what you are saying is untrue *and your penalty for an untruth under oath is terribly severe.* I am doing this only in justice to you, *I am trying to inform you of what you are subjecting yourself to, what you will become the target of* (emphasis ours).

(R. 1695) By Mr. Christenberry:

Q. Whose money is that? *Why don't you come clean?* (Emphasis ours.)

(R. 1698) By Mr. Christenberry:

Q. This is the *last opportunity you are going to have to straighten this affair up,* as far as I am concerned, unless the jury cares to give you another opportunity (emphasis ours).

(R. 1700) By Mr. Christenberry:

Q. You know what's going to happen: You're going to wind up—if I know this jury—*with a charge of perjury* in this case and the people that you are protecting are not going to be able to help you a bit (emphasis ours).

(R. 1704) By Mr. Christenberry:

Q. Answer the questions. If you take my advice, *you'd think about your future instead of your past* (emphasis ours).

By a Juror:

Q. I think you'd better give some thought to *Mr. Christenberry's advice* (emphasis ours).

(R. 1707) By Mr. Christenberry:

Q. Let me tell you this, you apparently don't appreciate the position you are in. You are under investigation.

By a Juror:

Q. You know this is the United States Grand Jury?
A. Yes.
Q. Do you know that your perjury counts for something *with regard to your freedom.* Do you know you definitely perjured yourself before this United States Grand Jury? (Emphasis ours.)

(R. 1714) By a Juror:

Q. You've got a lot of worries, *and you're going to have more worries.* (Emphasis ours.)

(R. 1715) By Mr. Christenberry:

Q. Let me tell you, you can't come back any more. If the Jury wants to take up its time with you, they're the boss but as far as I am concerned, I am not going to subpoena you. *This is your last opportunity* to come up here and tell the truth. If you don't want to do it, it's up to you. I have nothing further to say to you (emphasis ours).

(R. 1717) By Mr. Christenberry:

Q. All right, Astorias, *I'm tired of hearing your false statements.* The bonds are registered in your name and if you kept them in the bank box, no chance of finding it out (emphasis ours).

(R. 1924) By Mr. Christenberry:

Q. Do you have anything you want to add, any corrections?
A. No, sir.

By a Juror:

Q. You'd better *think long and hard* (emphasis ours).

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In the Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 416, 417 and 418

WILLIAM T. BURTON, JOE T. CAWTHORN, AND MARCEL F. LABRANCHE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 2191-2199) is reported at 175 F. 2d 960. The dissenting opinion by Circuit Judge Hutcheson (R. 2273-2277) on motions for rehearing, is reported at 176 F. 2d 865.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1949 (R. 2200) and petitions for rehearing were denied on September 23, 1949 (R.

2278). The petitions for writs of certiorari were filed on October 22, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a prosecution for conspiring to tamper with a jury, where the prosecution proved by the testimony of one member of the jury in question that another juror, one of the alleged co-conspirators, voted throughout the jury deliberations for acquittal, the trial judge erred in refusing to permit the defense to cross-examine the witness as to how the other jurors finally voted.

2. Whether, after defense counsel were allowed to examine a prior statement by a government witness and his testimony before the grand jury before cross-examining him, it was improper for the court to exclude such documents, later offered for the purpose of impeachment and as showing bias.

3. Whether the giving of the so-called *Allen* instruction, after the jury was unable to agree for twenty-five hours, and two days before the jury returned a verdict, was an illegal coercion of the jury verdict.

4. Whether the indictment was duplicitous for charging a conspiracy to obstruct the administration of justice and to defraud the United States of its right to an honest and unbiased jury.

5. Whether the only charge and evidence against petitioner LaBranche was with respect to the substantive offense of bribery so that he could not be guilty of conspiracy.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U.S.C. [1940 ed.] 88) provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 135 of the Criminal Code (18 U.S.C. [1940 ed.] 241) provided in pertinent part:

> Whoever corruptly * * * shall endeavor to influence, intimidate, or impede any witness, in any court of the United States * * *, or any grand or petit juror * * * of any court of the United States, * * * or who corruptly * * * shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.[1]

[1] The maximum fine and prison term imposable under this section were increased to $5,000 and five years, respectively, by the Act of June 8, 1945, c. 178, § 1, 59 Stat. 234, which was passed during the continuance of the conspiracy charged in the instant case.

Section 136 of the Criminal Code (18 U.S.C. [1940 ed.] 242) provided in pertinent part:

> If two or more persons conspire * * * to influence the verdict * * * of any * * * petit juror in any such court [*i.e.*, of the United States], * * * each of such persons shall be fined not more than $5,000, or imprisoned not more than six years, or both.[2]

STATEMENT

On January 3, 1946, a single-count indictment (R. 3-11) was filed in the United States District Court for the Eastern District of Louisiana. It charged the petitioners, William Burton, Joe Cawthorn, and Marcel LaBranche, together with James Noe, a codefendant, with having conspired with one another and with three others not indicted, Edwin Oliveira, Bernard Hughes, and John Astorias, "to commit offenses against the United States," namely, "corruptly to endeavor to influence, obstruct and impede and corruptly to influence, obstruct and impede the due administration of justice" in a certain criminal trial, held in June 1945 in the same federal district court, in which the petitioner Burton had been charged with income tax evasion, and "to de-

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[2] This section was amended, by the Act of June 8, 1945, c. 178, § 3, 59 Stat. 234, which was passed during the continuance of the conspiracy charged in the instant case, to read, in pertinent part:

"If two or more persons conspire to violate any provision of section 135 * * * of the Criminal Code, as amended, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished in like manner as provided by [that section]."

fraud the United States of and concerning its governmental function of considering and deciding [Burton's guilt in the tax case] through the petit jury * * * free from corruption, improper influence and fraud, by virtue of the personal and pecuniary interest of the petit jurors in the success of the defendant in the said criminal prosecution" (R. 4-5), in violation of Section 37 of the Criminal Code, (*supra*, p. 3).

Petitioner Burton was the principal figure involved, and the evidence showed one general conspiracy to effect his acquittal at his tax evasion trial, which lasted from June 4 to June 27, 1945 (R. 358, 1499-1500). The efforts of all the co-conspirators were directed to the achievement of this result.

The defendant Noe was a former Governor of Louisiana (R. 874) and a good friend of Burton (R. 1365). Knowing that Fred Dinghaus was a member of the petit jury panel for the trial of Burton's case (R. 453), Noe asked him in a conversation two or three weeks before the trial if he was on the jury. When Dinghaus replied that he was, Noe said, "Well, Burton is a good friend of mine; he is nothing but a country yap * * * and knows nothing about office work or bookkeeping." After Dinghaus answered that this did not make any difference because he would find a defendant guilty or not by giving him a fair trial according to what the evidence was, Noe said, "Well, I am sure that's all Mr. Burton would want." (R. 455, 456). Three

or four weeks after the Burton case ended in a mistrial, Noe summoned Dinghaus to his office and "thanked" him "for the outcome of the Burton case" (R. 457). Dinghaus demurred, saying, "I don't know whether or not you know how I voted." Noe replied, "Regardless of how you voted, I want to thank you anyway." (*Ibid.*)

The alleged co-conspirator Hughes, an insurance man, approached Henry Groffman, also an insurance man, in May 1945, after learning that Groffman was on the jury panel for Burton's trial. As a ruse to meet Groffman, Hughes stated he had an insurance prospect who was overweight and might get a better rate with one of Groffman's companies. (R. 449-451.) Immediately after their meeting began, Hughes mentioned the fact that Groffman was on the jury and stated that Burton was "the finest man in the world, but ignorant of bookkeeping and income taxes." He also asked Groffman several times to do "the right thing" for Burton. (R. 450.) Groffman, however, was subsequently excused from service on the Burton jury (R. 451). Supplementary evidence, tending to explain Hughes' interest in helping Burton to get acquitted, was as follows: Hughes had been foreman of a petit jury which had acquitted the alleged co-conspirator Noe in a tax evasion trial in 1942 (R. 450, 877); Noe thereafter purchased substantial amounts of insurance through Hughes as broker (R. 363-364, 371, 376, 380; Gov. Exs. 7 and 14, R. 1503, 1514); up to about the time of Burton's tax evasion trial, Noe owed

Hughes substantial sums in connection with these insurance transactions (R. 427-428, 432-433, 959; Gov. Ex. 48, R. 1589; Noe-Ervin Ex. 14, R. 1828-1829); Noe paid these debts at about the time of the commencement of Burton's tax trial (R. 407; Gov. Exs. 37 and 40, R. 1580-1581, 1584); the payment was made possible by Noe's obtaining funds from Burton (R. 399-400, 435-436, 998; Gov. Ex. 43, R. 1586).

Around the latter part of May or the first part of June, 1945, Hughes Walmsley, who knew both Noe and petitioner Cawthorn (R. 464), met them at his office at Noe's suggestion. Either Noe or Cawthorn, who was Burton's trial counsel in the tax fraud case (R. 1165-1167), showed Walmsley a list of the prospective jurors, and asked if he knew any of them (R. 465). After indicating he knew about ten of the jurors, Walmsley was asked by either Noe or Cawthorn if he knew any of them well enough to talk to them, to which Walmsley answered, "No" (R. 466). Noe and Cawthorn told Walmsley that it would be to his interest if he could help them in the matter of talking to the jurors, but he said he was not interested (R. 467). Later, about June 19, 1945, during the course of the Burton trial, Noe told Walmsley it would be to his benefit if he could help in the matter they discussed at the latter's office (R. 467). Also during the Burton trial, Cawthorn told Walmsley, in the lobby of the Roosevelt Hotel in New Orleans, that he could make $1,000 if he would "talk to those fel-

lows," but Walmsley declined, saying he was not interested (R. 468-469). On a second occasion during the trial, in the same hotel lobby, Cawthorn asked Walmsley if he would talk to any of "those people," but was told, "No." (R. 470.) On a third occasion in this hotel lobby, during the early part of June 1945, Burton himself spoke to Walmsley about his lack of bookkeeping knowledge and complained that the Government was taking unfair advantage of him (R. 471). Walmsley did not contact any of the jurors either prior to or during the trial (R. 471).

Oliveira and his "good friend", petitioner LaBranche, were both members of the jury panel selected for the Burton trial (R. 557, 558, 559). On or about June 4, 1945,[3] Oliveira and LaBranche, having heard a rumor that "there would be plenty [of] money put out for the jury," agreed that if either of them should be chosen to serve on the jury, they would divide any money received by the one selected. Oliveira was excused by the Government from jury service, but LaBranche served. (R. 558-559.) That evening the two men met at the "Town Club" in New Orleans, where Oliveira said he would make "the necessary contacts" for getting "some money" (R. 559-560). Later, Oliveira met petitioner Cawthorn on the street. Caw-

[3] All dates referred to in Oliveira's testimony are approximate only. Oliveira testified that he could not possibly remember the exact dates of his meetings and conversations with LaBranche, Cawthorn, and Burton (R. 567, 571, 575, 577, 580, 584, etc.).

thorn told Oliveira he was sorry the latter did not "get on the jury," but asked if he had any "good friend" on it. Oliveira mentioned LaBranche, and Cawthorn inquired whether LaBranche could be trusted and whether he would be interested in "making some money." Oliveira said he would have to discuss the matter with LaBranche. Cawthorn admonished Oliveira to "be careful, because you are dealing with the Government. It is a serious matter." (R. 561, 562.) When Oliveira next saw LaBranche, LaBranche at first seemed not interested, but finally told Oliveira to "see what you can do" about "getting some money" (R. 562-563). Thereafter, Cawthorn and Oliveira again met on the street. Cawthorn told Oliveira to inform LaBranche that there "will be a thousand dollars for him and five hundred for you if he votes favorably in the acquittal of Mr. Burton." (R. 563.) This agreement had been approved by Burton (R. 566). When Oliveira conveyed this message to LaBranche, LaBranche expressed concern at the chances he and Oliveira were taking, and it was decided that Oliveira should see Cawthorn again in an effort to get "a larger amount of money" (R. 563, 564.) Later, Cawthorn met Oliveira in the St. Charles Hotel lobby (R. 566), where Cawthorn told Oliveira to meet him in a certain room in the hotel. Oliveira there reported to Cawthorn that LaBranche "wasn't satisfied." Cawthorn told Oliveira to "go back and tell LaBranche not to worry about that money— * * * that we all

would get more money after the trial was over; that Burton was a good fellow." (R. 567-568.) At about the middle of the trial one night in the Roosevelt Hotel, Burton personally confirmed Oliveira's understanding, reached with Cawthorn, that LaBranche was to receive $1,000 and Oliveira $500 (R. 568, 569).

On the evening of the day on which the trial ended (R. 569), Oliveira asked Burton about the money, and Burton advised him that he would get the $1,500 in a package from the alleged co-conspirator Astorias, the Roosevelt Hotel chef, on the following morning (R. 570). When Oliveira asked Astorias for the package, Astorias said he knew "Mr. Burton very well, but he didn't leave any package" (R. 571). When Oliveira imparted this advice to LaBranche, the latter lamented, "It looks like we're blowed up—that we ain't going to get anything" (R. 572). However, about two weeks after the trial, LaBranche did receive from Astorias a package containing $1,500, which Burton had left with Astorias to be turned over to LaBranche (R. 573, 650). Oliveira and LaBranche divided the money at the Monteleone Hotel (R. 573). Some two to four weeks later, Burton thanked Astorias "for giving the man the package, it worried the hell out of me" (R. 651).

The Government also showed that on or about May 24, 1945, eleven days before the commencement of his tax evasion trial on June 4th, petitioner Burton drew $70,000 from his personal account in

a Lake Charles, Louisiana bank (R. 1411-1412; Gov. Ex. 65, R. 1605). Burton admitted drawing out this money (R. 1411) and described it as his "fighting fund" (R. 1415).

At Burton's tax evasion trial, LaBranche voted for Burton's acquittal during the entire course of the deliberations (R. 545). That prosecution resulted in a mistrial because of failure of the jury to agree (R. 358, 1499-1500).

The jury in the instant trial acquitted Noe, but found petitioners Burton, Cawthorn and LaBranche guilty (R. 287). Each of the petitioners was sentenced to two years' imprisonment and to a fine of $10,000 (R. 2165, 2166-2167, 2167-2168). On appeal to the Court of Appeals for the Fifth Circuit, the judgments of conviction were affirmed (R. 2200). Petitions for rehearing were thereafter denied (R. 2278), one judge (Hutcheson, J.) dissenting, expressing the view that the convictions should be reversed and a new trial granted, on the sole ground that the trial court committed prejudicial error in limiting the cross-examination of a certain prosecution witness, a juror in the Burton trial (R. 2273-2277), as to which see pp. 11-23, *infra*.

ARGUMENT

1. Leon Adams, one of the jurors in the Burton tax evasion prosecution, was a government witness in the instant conspiracy case (R. 544). On direct examination, he testified, without objection, that petitioner LaBranche, one of his fellow jurors in

the tax evasion case, voted for Burton's acquittal "[d]uring the entire course of the deliberations" (R. 544-545). The obvious purpose of the Government in eliciting this testimony was, of course, to corroborate so much of the Government's other evidence (see pp. 8-11, *supra*) as tended to show a conspiracy on the part of petitioners to purchase LaBranche's favorable vote as a juror in the tax evasion prosecution. On cross-examination, Adams was asked "how many other [jurors] voted for not guilty?" (R. 545.) Government counsel objected on the ground that it was "entirely irrelevant and immaterial" how other jurors voted (*ibid.*).

Argument on the question of the propriety of this line of cross-examination was then had outside the presence of the jury (R. 546-554). The essence of defense counsel's argument in support of the legitimacy of the challenged question was as follows (R. 550):

> * * * This witness [Adams] is presented by the Government. * * * he is asked a question, how did a particular man vote? Well, I would think it would be absolutely elementary that on cross-examination this witness' *memory can be tested,* his credibility can be tested and he can be asked, individually, the names of every one of those men *to determine whether or not he remembers how everybody else voted.* * * * [italics added]

The trial judge countered that "you can't test the credibility of a witness on a collateral matter" (R.

551), to which defense counsel replied, "You can't contradict a witness on a collateral matter, but you certainly *can test his credibility* on a collateral matter" [italics added] (*ibid.*). Further exchanges between the trial judge and defense counsel in this colloquy likewise indicate that the point at issue between them was the propriety or impropriety of the question which occasioned the colloquy as a cross-examination device for exploring the matter of the witness Adams' *memory and credibility* in respect of his direct testimony that LaBranche had voted for Burton's acquittal throughout the jury's deliberations (see R. 551-552).

At the conclusion of the colloquy, the trial judge announced his decision in these terms (R. 552-553):

> * * * you can't test his credibility on a collateral matter. I am convinced * * * that it is entirely irrelevant * * * how other jurors voted in this proceeding. * * * It is certainly not the purpose of the Court to shut off any cross-examination that the Court considers proper. I simply intend to rule * * * that I take it it will be improper to ask the witness how the balance of the jury voted in this case. * * * that is the only restriction I am placing on the cross-examination.

The jury was then recalled and the cross-examination of Adams resumed. Defense counsel was permitted to ask the witness if he remembered how each of eight other named jurors voted, "without saying how he voted," and the answer was in the

affirmative in each instance (R. 555). The judge also permitted the following question (*ibid.*): "Do you remember whether or not any of those men, without naming them or saying how they voted, took one position at the first ballot and didn't change throughout?" The reply, not entirely responsive, was (R. 556): "There were some changes. There were changes during the deliberations from the original ballot. * * * There were certain ones that might have changed—that did change." This reply evidently satisfied defense counsel, as no further questions were asked the witness.

The dissenting judge below based his dissent solely on his belief that the trial judge erred in refusing to permit the witness Adams to be cross-examined as to how many jurors other than LaBranche voted for Burton's acquittal. He said (R. 2275-2276):

> It is and was the contention of the defendants that had the juror [Adams] been permitted to testify as to how each juror voted, his testimony would have shown that some of them voted for acquittal, some for conviction, and that when the jury was discharged, eight were for acquittal and four were for conviction. Their cross examination limited on the wholly untenable theory that how the other jurors voted was immaterial, defendants, compelled to have the issue go to the jury on the evidence that LaBranche had voted throughout for acquittal, were deprived of their right to show that others had voted for acquittal too * * *.

Petitioners now adopt this argument (Burton Pet. 8-15; Cawthorn Pet. 18-21; LaBranche Pet. 20-24). Thus, petitioner Burton argues (Pet. 12) that "As a result of the trial court's action * * * the defendants were prevented from showing that numerous other members of the jury in the income tax case had voted for acquittal." And see Cawthorn Pet. 20; LaBranche Pet. 20-21. As we have pointed out, however (*supra,* pp. 11-13), the sole articulated point of dispute between defense counsel and the trial judge during the colloquy concerning the propriety of the controverted question sought to be asked Adams was the legitimacy of that line of questioning as a means of testing Adams' *memory and credibility* in respect of his direct testimony that the juror LaBranche had voted for acquittal throughout the jury's deliberations.[4]

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[4] It is true that in one isolated passage during the colloquy, which extended over some nine pages of the printed record (R. 546-554), defense counsel remarked that "it would be most unfair to have it appear here now that LaBranche was the only one that voted that way" (R. 552). Whatever merit this point might have had, however, it was articulated at no other time during the colloquy, and it is manifest from a reading of the colloquy as a whole that it was never brought home to the trial judge as possibly a sound basis for the admissibility of the controverted line of questioning, distinct from its asserted relevancy as a test of the witness' memory and credibility. Cf. *Johnson* v. *United States,* 318 U. S. 189, 199-201.

The only other record reference supplied by petitioners (see Burton Pet. 12) as evidence of their reliance at the trial on the now-asserted claim that the disputed line of questioning was relevant to show that other jurors than LaBranche also voted for Burton's acquittal is R. 2142, where defense counsel stated: "* * * we proposed to show, as a matter of fact, the jury was eight to four for acquittal * * *." This, however, occurred long after the trial in connection with argu-

But apart from petitioners' tardiness in articulating this contention, we submit that it is without merit. Their reliance on *Clark* v. *United States*, 289 U. S. 1, 12-19, is misplaced. That case involved a prosecution for contempt of court by one Mrs. Clark, the charge being that she, a prospective juror in the trial of one Foshay for mail fraud, wilfully concealed at her *voir dire* examination the fact that she had formerly been employed by a company headed by Foshay and had other reasons to be biased in Foshay's favor, and wilfully and falsely swore to lack of bias with respect to Foshay. At the trial on the contempt charge, the Government adduced evidence to show Mrs. Clark's bias in favor of Foshay (and consequently the false and misleading nature of her answers on the *voir dire*), and also showed that during the jury deliberations in the Foshay trial (which resulted in a mistrial by virtue of a hung jury, 11 jurors having been for conviction and one for acquittal) Mrs. Clark was the one juror who steadfastly voted for Foshay's acquittal. The sole issue before this Court (having any relevance to the issue in the present case) was the admissibility of Mrs. Clark's conduct as a juror in the Foshay trial and the manner in which she held out for Foshay's acquittal throughout the

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ments on motions to set aside the verdicts (see R. 2122). Even at that stage of the proceedings, moreover, it is clear that this argument was so blended and confused with the distinct argument relating to the question's relevance in respect of the issue of Adams' memory and credibility that it was never adequately brought to the trial judge's attention.

jury's deliberations. The argument advanced in opposition to the admissibility of this evidence was, in the words of the Court (289 U. S. at 12-13), that "* * * the arguments and votes of jurors, the *media concludendi,* are secrets, protected from disclosure unless the privilege is waived. * * * Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." But the Court, while conceding the "force of these considerations" (289 U. S. at 13), held that social policy dictated an *exception* to this basic rule where a juror in a given case became a juror by virtue of concealment of the truth at her *voir dire* examination. The Court said (289 U. S. at 14):

> The privilege [not to have one's conduct and vote as a juror disclosed] takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in. Upon that showing being made, the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would

exist without them. Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote. The argument for the petitioner, if accepted, would bring us to a holding that the case for the People must go to the triers of the facts without proof that the vote has been responsive to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind.[5]

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[5] *State* v. *Serpas*, 188 La. 1074 (1938), relied on by the dissenting judge below (R. 2276) and by petitioner Burton (Pet. 13), presented a situation just the converse of that of the *Clark* case. Serpas was charged with wilfully perjuring himself by denying, on *voir dire* examination, that he knew any member of the family of one Goodwin, on trial in a criminal case. In consequence of this denial, and being otherwise qualified, he was accepted as a juror for the Goodwin trial, which resulted in a hung jury, of whom eleven were for conviction, the twelfth refusing to participate in the deliberations. Serpas in fact did know a member of Goodwin's family, but claimed at his perjury trial that he had not known, at the time of Goodwin's trial, that the person he knew was related to Goodwin. To substantiate his claim of lack of wilfulness in denying being acquainted with any member of Goodwin's family, he offered to prove that he was one of the eleven who had voted to convict Goodwin, and not the recalcitrant juror. This offer of proof was rejected by the trial judge, but on appeal the ruling was reversed, largely on the authority of this Court's decision in the *Clark* case.

The *Serpas* decision was, we think, plainly correct, both for the reasons which dictated the result in the *Clark* case, *viz.*, an overriding social policy requiring, in the circumstances, relaxation of the rule that the way in which a juror votes may not be disclosed, and for the equally cogent reason that Serpas, by offering to show how he voted, waived his privilege against disclosure. But the *Serpas* issue, like the *Clark* issue, is manifestly distinct from that presented by the case at bar.

Thus, the *Clark* case is square authority for the propriety of the Government's evidence in this case that the juror LaBranche held out for Burton's acquittal throughout the jury's deliberations, and, indeed, it was because of defense counsel's awareness of the *Clark* holding that no objection was made at the instant trial to that evidence (see R. 546). But it is not authority, as petitioners and the dissenting judge below suppose (see R. 2276), for the further proposition that the defense was entitled to show, on cross-examination of the witness Adams, that jurors *other than LaBranche* also held out for Burton's acquittal. No such issue was before the Court in the *Clark* case. It is true that it appears in the *Clark* opinion (see 289 U.S. at 9; and for the lower courts' opinions in that case, see 61 F. 2d 695, 698; 1 F. Supp. 747, 750) that Mrs. Clark *alone* voted for acquittal, all eleven of the other jurors having been for conviction. But there was no question in the *Clark* case as to the propriety or impropriety of evidence as to how jurors other than Mrs. Clark had voted. It does not even appear by what means the 11-to-1 split among the jurors was ascertained. Moreover, the *Clark* case involved a contempt proceeding before a judge sitting without a jury (unlike the case at bar), and it may be that, because of that fact, rules of evidence were not insisted upon strictly. Consequently, the *Clark* case is not an authority for petitioners' present contention.

Rather, insofar as the *Clark* case is at all controlling on the present issue, it is adverse to petitioners' contention. For the Court in the *Clark* case acknowledged as a *general principle* that the conduct and votes of jurors are properly considered secret matters which may not be divulged, without express consent on the part of each juror involved, *except* when an overriding consideration of public policy (which was found to be present in the peculiar circumstances of that case, so far as the vote of Mrs. Clark was concerned) dictates a relaxation of this rule. But no such consideration is present in the case at bar. The present issue is governed by the general principle recognized in the *Clark* case, rather than by the exception carved out of that principle by that case.

Correctly interpreted, the *Clark* case stands for the twofold proposition that (1) jurors, in general, are privileged not to have their conduct and manner of voting disclosed without their express consent, but that (2), by way of exception, where a certain juror is on trial for his own misconduct in connection with his status as a juror, he may not rely on this privilege. In the instant case, if jurors other than LaBranche had also been on trial for misconduct, it would of course have been proper, under the *Clark* decision, to admit evidence as to how they voted. But, no juror other than LaBranche having been charged with misconduct, the trial judge correctly excluded the

line of questioning, in the cross-examination of Adams, designed to show how other jurors voted. The issue before the jury—so far as is immediately pertinent—was whether the juror LaBranche had been "bought." There was evidence that he had been. Corroborating that evidence was the unchallenged additional evidence that his vote was "responsive to the bribe" (289 U.S. at 14). The manner of voting of no other juror was in issue, the integrity of no other juror having been challenged by the Government. It was quite irrelevant, therefore, to any issue at the trial how any other juror voted. Even if, as is now claimed, the defense could have proved, through cross-examination of the witness Adams, that seven other jurors had also voted for Burton's acquittal, that fact could have had no relevance, because their votes (unlike LaBranche's) were susceptible of no sinister interpretation. The situation here is closely parallel to that discussed in *United States* v. *Manton,* 107 F. 2d 834, 845-846 (C.A. 2) certiorari denied, 309 U.S. 664. It was there pointed out that the fact that the appeals in which Judge Manton participated might in fact have been "rightly decided," and that "the other judges who sat in the various cases" with Manton voted with him, was entirely irrelevant, because Manton's fellow judges "acted honestly and with pure motives," whereas Manton acted "for a price." Here, LaBranche would have been just as guilty

in the eyes of the jury, and rightly so, if the latter believed that seven other jurors voted honestly for Burton's acquittal, while he alone voted dishonestly, as if the jury believed that LaBranche was the only juror who voted for acquittal.

Furthermore, as we have pointed out (*supra*, p. 14), the defense was permitted to establish, in its cross-examination of Adams, that certain of LaBranche's fellow jurors changed their votes during the course of the deliberations. Thus, the jury in the instant case knew that at least at some stage or stages of the deliberations some of LaBranche's co-jurors also favored the acquittal of Burton. Consequently, the jury in the instant case were well aware that the evidence against Burton was not such that only a "bought" juror could possibly have held out for his acquittal. It is not true, therefore, as petitioners contend (Burton Pet 12; and see Cawthorn Pet. 20; LaBranche Pet. 21), that the jury below were "left to conclude" that LaBranche was the only juror in the tax-fraud trial that ever favored Burton's acquittal, and that they thus must inevitably have inferred that LaBranche's vote "must have been motivated by some factor other than the merits—the bribe allegedly paid him." On the contrary, the jury in this case was at no time under the impression that LaBranche and only LaBranche cast his vote for Burton's acquittal.

For the foregoing reasons, we submit, no error, and certainly no reversible error, was committed by

the trial judge in ruling out the attempted line of cross-examination.[6]

2. John Astorias, one of the alleged but unindicted co-conspirators, was a prosecution witness at petitioners' trial. He had previously appeared three times before the grand jury which indicted petitioners, and had also made a statement to Treasury agents. The transcript of his grand jury testimony and of his statement to the Treasury agents covered, in all, some 77 printed pages (see R. 2197). With the object of discrediting Astorias' testimony at the trial by eliciting from him admissions that he had previously given conflicting statements to the grand jury and to the Treasury agents, defense counsel asked leave of court to examine Astorias' earlier statements for cross-examination

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[6] Additionally, it should be pointed out that, assuming—for argument's sake only—that the defense was entitled further to show that jurors other than LaBranche also voted for Burton's acquittal, the mode of proving this fact which the defense attempted was improper. The proper course would have been to call, as defense witnesses, the various jurors who sat in the tax case and to ask each how he voted. Each juror could then have claimed or waived, as he saw fit, his privilege not to disclose his manner of voting. Instead, the defense attempted to establish that other jurors voted for Burton's acquittal by cross-examination of Adams. This was improper for the twofold reason that (1) Adams had no right to waive the personal privilege of each of the other jurors against disclosure of his vote, and (2) this line of interrogation was beyond the scope of the direct examination, and hence improper under familiar principles, since Adams had been asked on direct solely how LaBranche had voted. In short, proof that jurors other than LaBranche had also voted "not guilty," if competent at all (which we deny), was properly a part of the defense's affirmative case, and hence not properly adducible by cross-examination of the government witness Adams.

purposes (R. 687-688, 694-695, 1356). The request was granted, and defense counsel were given all the time they needed to examine Astorias' earlier statements—considerably more time, in fact, than was asked for (R. 1356). On cross-examination, Astorias was confronted with four selected excerpts from the transcripts of his earlier statements, which the defense maintained conflicted with his trial testimony; he readily admitted having made the earlier statements with which he was confronted, and this concluded his cross-examination (R. 696-698). Shortly thereafter, the Government rested its case (R. 703), and Astorias returned to his home in Gulfport, Mississippi.

Near the end of the trial, the defense offered in evidence the entire transcripts of Astorias' prior statements to the grand jury and Treasury agents, as defense exhibits (Burton) 1, 2, 3, and 4 (R. 1347-1348), for the announced purpose of showing "the state of mind of the witness and his motive in testifying, * * * and for the further purpose of impeaching the witness" (R. 1356). As later more fully articulated, the purpose of the offer was "to show that the witness testified as a result of fear, and under duress, hence has an interest and a motive, and is biased" (R. 1797). The Government objected to the offer, and its objection was sustained on the ground that "it is a well settled principle that a witness cannot be discredited or his hostility or bias shown by proving statements made by him outside the Court which do not harmonize

with the statements made by him on the witness stand until his attention has been called specifically to the former statements, with particularity as to time, place and circumstances, so that he can deny or explain them" (R. 1355). Numerous decisions were cited by the trial judge in support of his ruling (R. 1356-1357).

Petitioners now renew their argument, which was unanimously rejected by the Court of Appeals (R. 2197-2198), that it was error to exclude the proffered transcripts (Burton Pet. 15-24; Cawthorn Pet. 22-25; LaBranche Pet. 24-29). The trial court's ruling was, however, in full accord with the well established principle stated in *The Charles Morgan,* 115 U. S. 69, 77, that "contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it." The ruling likewise accorded with the other decisions cited by the trial judge to the same effect (see R. 1356-1357). See also *Arnstein* v. *United States,* 296 Fed. 946, 950 (C.A. D.C.), certiorari denied, 264 U. S. 595.

Clearly distinguishing the instant case from the decisions cited by petitioners, including those indicating that evidence of bias is admissible without the requirement of laying a foundation (see Burton

Pet. 27; Cawthorn Pet. 25; LaBranche Pet. 27), is the fact that defense counsel were given two hours, though only one was requested, in which to examine Astorias' earlier statements before probing the witness in respect of prior inconsistent statements and bias (R. 1356); yet, as we have indicated, he was questioned in regard to only four selected excerpts from the entire transcripts of his earlier statements.

Petitioners assert that much evidence contained in the excluded documents showed that the prosecutor and the grand jurors accused Astorias of perjury (see Burton Pet. 19; Cawthorn Pet. 24; LaBranche Pet. 28-29), and that the jury should have been allowed to hear this to show Astorias' self-interest and bias in testifying for the Government. However, on his cross-examination, Astorias admitted he had committed perjury (R. 676), so that the jury were fully aware of that fact in weighing the credibility of his testimony. Petitioners also argue that the Court of Appeals was wrong in stating that "there was * * * already in evidence without contradiction all that these lengthy documents would tend to show" (R. 2198) regarding Astorias' fear of prosecution for not having paid his income taxes. They point out that Astorias denied on cross-examination that he feared being indicted for income tax evasion (R. 664, 666), whereas the excluded documents would have shown that he was apprehensive of indictment (see Burton Pet. 20-21;

Cawthorn Pet. 23; LaBranche Pet. 28). But Astorias admitted on cross-examination that he knew the Treasury agents were investigating his affairs (R. 657); that he went before the grand jury about three months after the federal agents learned of the existence of $19,000 in a safety deposit box upon which he had not paid income taxes (R. 662); and that he was "scared [he] was going to be mixed up in something" and that he never mixed up in anything (R. 664). Thus, the jury were thoroughly apprised, from Astorias' own testimony, of his fears arising from his income tax difficulties, and the evidence to that effect contained in the excluded documents could consequently have had no more than cumulative effect.

Petitioners rely upon *United States* v. *Krulewitch,* 145 F. 2d 76 (C.A. 2) (see Burton Pet. 22-23; LaBranche Pet. 27), as conflicting with the Court of Appeals' decision in this respect. However, the situations in the two cases are entirely different. In the *Krulewitch* case, the trial judge, after examining a prior statement given to the F.B.I. by a government witness to ascertain if the statement contradicted the witness' testimony, refused to permit the defendant's counsel to inspect the document and sealed it as part of the record; here, as we have shown, the trial judge gave defense counsel ample time in which to examine the transcripts of Astorias' earlier statements and freely permitted counsel to use the transcripts for cross-

examination purposes. The very basis of the *Krulewitch* holding was that, because of the refusal to permit inspection of the witness' earlier statement, it had been impossible for the defense to lay the proper foundation for the introduction of the statement in evidence in the event the witness denied having made it (145 F. 2d at 79).

3. Petitioners maintain that the trial court's use of the *Allen* instruction (based on *Allen* v. *United States,* 164 U. S. 492, 501), as a supplemental charge, had a coercive effect upon the jury and deprived petitioners of a fair trial (Burton Pet. 24-28; Cawthorn Pet. 21-22; LaBranche Pet. 29-31). The contention is clearly insubstantial.

On Saturday morning, May 15, 1948, the case was submitted to the jury (R. 283, 284). At noon on the following day, the court informed the jury that they had been out 25 hours and was told they could not agree on a verdict (R. 1453-1454). The court thereupon gave the jury a supplemental charge (R. 1454-1455) in the exact language of an instruction approved by the Massachusetts Supreme Court in *Commonwealth* v. *Tuey,* 8 Cush. 1, and by this Court in *Allen* v. *United States,* 164 U. S. 492, 501.[7] Upon completion of this supplemental charge, the court asked if there were any exceptions and counsel for

[7] Petitioner Burton's statement (Burton Pet. 26) that the quoted portion of the instruction was an "additional" instruction, which he proceeds to criticize, is not correct because this was a *verbatim* part of the instruction taken from the *Tuey* case.

petitioners made no objections (R. 1455).[8] It was not until May 18, two days later, at about 11:00 a.m., that the jury returned their verdict (R. 286, 287).[9]

In these circumstances, it seems obvious that the court's supplemental charge did not coerce the jury in arriving at their verdict, not agreed upon until about 48 hours later. If there had been any degree of coercion, the verdict would certainly have been reached much sooner.[10] In any event, since the supplemental charge here given was one expressly approved by this Court in the *Allen* case, it was manifestly proper for the trial court to give it.

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[8] *Brasfield* v. *United States*, 272 U.S. 448, is cited (Cawthorn Pet. 22) for the proposition that the fact that no exceptions were taken to the supplemental instructions does not preclude this Court from correcting a manifest error. The *Brasfield* case, however, was not concerned with any question of supplemental instructions. It held only that it was reversible error for a trial judge to ask a disagreeing jury how they were divided.

[9] Petitioners' statement (Burton Pet. 24; LaBranche Pet. 29-30) that after the giving of the supplemental charge the jury was locked up and held *incommunicado* for 48 hours is incorrect and misleading. On each night the jurors had comfortable rooms in the St. Charles Hotel, and the trial judge was at all times available if the jury had questions.

[10] In *Peterson* v. *United States*, 213 Fed. 920 (C.A. 9), relied on by petitioner Burton (Pet. 27), the supplemental charge was "plainly coercive" in stating that "the government has a right to a verdict without further expenditure of time and money" (213 Fed. at 924) and the jury returned with a verdict in less than an hour (213 Fed. at 926). And in *Edwards* v. *United States*, 7 F. 2d 598, 600 (C.A. 8), relied on by petitioner LaBranche (Pet. 30), the charge contained coercive language not used in the instant case, and the coercive effect was evident from the fact that the jury returned a verdict almost immediately after the giving of the supplemental charge.

Weathers v. *United States*, 126 F. 2d 118, 120 (C.A. 5), certiorari denied, 316 U. S. 681; see also *Hyde* v. *United States*, 225 U. S. 347, 381-383; *United States* v. *King*, 162 F. 2d 594, 596 (C.A. 2).[11]

4. Petitioners contend (Burton Pet. 28-32; Cawthorn Pet. 26; LaBranche Pet. 17-20) that the indictment is duplicitous because it charges that the object of the conspiracy was twofold, *i.e.*, to commit an offense against the United States ("corruptly to endeavor to influence, obstruct and impede and corruptly to influence, obstruct and impede the due administration of justice" in a federal court by bribing a juror, in violation of Section 135 of the Criminal Code, *supra*, p. 3) and "to defraud the United States of and concerning its governmental function of considering and deciding [Burton's guilt in the tax evasion case] through the petit jury * * * free from corruption," etc. Similar contentions have been rejected as often as they have been advanced. It has long been settled that a conspiracy indictment or count of this type, where the objective statutory violation bears an obvious relation to the defrauding of the United States with which it is linked as an object of the conspiracy, is not objectionable for duplicity. *May* v. *United States*, 175 F. 2d 994, 1002 (C.A. D.C.), certiorari

[11] *Burton* v. *United States*, 196 U.S. 283, cited by petitioners (Burton Pet. 26-27; Cawthorn Pet. 22; LaBranche Pet. 31), did not hold there was any error in giving the *Allen* charge, but that it was error to refuse the defendant's request that the court instruct the jury that those requests to charge which had been allowed were as much a part of the charge as the instructions read by the court as emanating from itself. 196 U.S. at 306.

denied October 10, 1949, Nos. 100-102, this Term; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U. S. 664. Moreover, "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States*, 249 U. S. 204, 209-210; *Braverman* v. *United States*, 317 U. S. 49, 54; *Pinkerton* v. *United States*, 328 U. S. 640, 642-643.[12]

5. Finally, petitioner LaBranche argues that since the indictment charged, and the evidence showed, a conspiracy merely to give and receive

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[12] Petitioners' related contention—that their offense, if any, consisted of violating Section 136 of the Criminal Code, *supra*, p. 4 (the special conspiracy statute dealing with conspiracies to influence jury verdicts) rather than Section 37, *supra*, p. 3 (the general conspiracy statute providing for the punishment of any conspiracy to commit an offense against the United States or to defraud the United States)—is, we think, adequately disposed of by the court below (see R. 2193-2194), which was unanimous on this point. "Section 136 and Section 37 may overlap," as the court below observed (R. 2193), "but neither was intended to repeal or supersede the other." Petitioners, in any event, can scarcely complain of having been prejudiced by being prosecuted under Section 37 rather than Section 136, since the maximum prison sentence imposable under the latter section was thrice the two-year maximum fixed by the former (though a lower maximum fine ($5,000) was fixed by Section 136 than by Section 37 ($10,000)).

There is no conflict, as claimed by petitioners (Burton Pet. 32; Cawthorn Pet. 26), between the decision below and *Enfield* v. *United States*, 261 Fed. 141 (C.A. 8). In the latter case, it was concluded, from the *express language* of Section 4 of the Espionage Act of 1917, 40 Stat. 219 (providing the same penalty for conspiring to violate either § 2 or § 3 of that Act as was fixed by the particular section whose violation was contemplated by the conspiracy, but providing that conspiracies to violate any other section of the Act should be punished under the general conspiracy statute, *i.e.*, Criminal Code, § 37), that "this section [*i.e.*, § 4 of the Espionage Act] was expressly intended to replace section 37 [of the Criminal Code] in those cases to which it is applicable" (261 Fed. at 142).

a bribe and actual commission of the substantive offense, the indictment should have been dismissed as to him (LaBranche Pet. 8-17). The contention is clearly without merit.

The indictment does not charge the substantive offense of giving or receiving bribes nor a conspiracy to give or accept bribes, but rather, in the language of the analogous *Manton* case, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664, "a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense." Cf. *Glasser* v. *United States*, 315 U.S. 60, 66-67.

The mere fact that the bribery of LaBranche was consummated, as shown by the evidence, did not serve to merge the conspiracy with the accomplished crime of bribery. *Pinkerton* v. *United States*, 328 U.S. 640, 644. A similar contention was squarely rejected in the jury tampering case of *Sneed* v. *United States*, 298 Fed. 911, 913 (C.A. 5), certiorari denied, 265 U.S. 590, which was cited with approval on this point in the *Pinkerton* case.[13]

[13] In the *Pinkerton* case, the Court stated: "Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed* v. *United States*, *supra*, p. 913. 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act."

United States v. *Zeuli*, 137 F. 2d 845 (C.A. 2), cited as being in conflict with the decision below, is clearly distinguishable. The conspiracy there charged was a conspiracy to steal gasoline ration books and convert them, knowing their stolen character. The defendant's conviction was reversed because, though he knew the ration books were stolen, there was no evidence connecting him with the theft. Here, on the other hand, the evidence showed that LaBranche discussed the conspiracy and contemplated bribery with Oliveira even before he was accepted as a juror (R. 559), negotiated with Cawthorn through Oliveira in fixing the amount of the bribe (R. 563), knew that Burton had authorized the bribe and its amount (R. 566), and actually received the bribe money (R. 573). Plainly, LaBranche was intimately connected with, and a member of, the conspiracy from the outset. Also inapposite here is *United States* v. *Dietrich*, 126 Fed. 664 (C. C. D. Neb.), another case relied on by LaBranche (Pet. 11). There the agreement to give and receive the bribe was between two persons only, the giver and the receiver, and this point was the crux of the decision that, this agreement being of the essence of the substantive offense of bribery, it could not be made the basis for a conspiracy charge.[14] Here,

[14] See *United States* v. *Glasser*, 116 F. 2d 690, 696 (C.A. 7), affirmed in part (on this point, 315 U.S. at 67) and reversed in part, 315 U.S. 60, holding the *Dietrich* case not in point as authority for the same contention as is here made by petitioner LaBranche.

however, the conspiracy was to obstruct the administration of justice and defraud the United States of its right to an honest and unbiased jury, and LaBranche was but one member, though a key one, of the conspiracy, which also included, at least, Burton, Cawthorn, Oliveira, and Astorias.

CONCLUSION

The judgment below is correct, and there is no real conflict of decisions. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
ROBERT G. MAYSACK,
Attorneys.

DECEMBER 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 864343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 416.

WILLIAM BURTON, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR THE PETITIONER.

The brief of the Government serves only to make plain the general importance of the principal question raised in the petition—a question which may reasonably be expected frequently to recur in the future in the trial of criminal cases in the federal courts:

Whether the privilege recognized in the *Clark* case, after an accused juror's individual ballot has been put in evidence, bars defense cross-examination to show—without

referring to any individual juror's vote—the total number of votes for acquittal in the ballots of a discharged jury.

I.

The Government, in seeking to uphold the prohibition of cross-examination as to the number of votes for acquittal, relies on five contentions none of which will bear analysis:

(a) "The sole articulate point of dispute between defense counsel * * * was the legitimacy of that line of questioning as a means of testing Adams' *memory and credibility* in respect to his direct testimony * * *" (Govt. Br. 11-15). (Emphasis supplied)

The Government ignores the record. The question by defense counsel was (R. 545):

> "How many others voted for not guilty?"

The issue was raised by objection of the Government (R. 545):

> "Just before you answer that question, I would like to make an objection, on the ground that it is entirely *irrelevant* and *immaterial* what anybody else did." (Emphasis supplied)

Expressly recognizing privilege as not involved[1] Government counsel reiterated (R. 549):

> "But you do have a question of relevancy, and I think it is absolutely irrelevant for the defense to try to bring in what the other jurors did."

(R. 550):

> "Whatever the other jurors did, we respectfully submit is entirely irrelevant and inadmissible."

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[1] Government Attorney Weinstein said (R. 549): "And I think under the *Clark* case, it is very clear that in a situation such as this, the privilege is out the window * * *".

The issue thus presented was whether the question was proper cross-examination, i.e., relevant to the testimony on direct. This was recognized by the court as the question raised. It was the question decided. The court said (R. 552):

> "I am convinced in my own mind that it is entirely irrelevant and it is immaterial how other jurors voted in this proceeding."

(R. 553):

> "I simply state at this time that I take it it will be improper to ask the witness how the balance of the jury voted in this case. I don't think it is proper."

The Government's assertion that petitioner is tardy in making his contention that this was proper cross-examination: (1) erroneously assumes that the cross-examiner must preface each question by assigning a proper ground therefor and ignores the fact that the issue was raised by its own objection, based solely on the ground of irrelevance, and (2) ignores that defense counsel arguing the point directly stated (R. 552):

> "—it would be more unfair to have it appear here now that LaBranche was the only one who voted that way, without good reason and without good cause. Relevancy, after all, is a matter of logic and logic, of course, is common sense, and a question of common sense."

The Government (Govt. Br. 15) in its attempt to minimize the record showing the ground upon which the issue was decided not only ignores the clear showing that irrelevance was the objection by it asserted, but as well displays the frivolous nature of its position for it complains (Govt. Br. 15, Note 4) merely that defense counsel did not assert more frequently or at greater length, the obvious point that the number of votes for or against acquittal was a circumstance directly affecting the probative weight of the fact of LaBranche's vote for acquittal, which in turn was of-

fered "to further corroborate and link in all of our [Government's] evidence" (R. 548).

(b) The Government attempts to blur the question by stating it to be whether the court properly refused "to permit the defense to cross-examine the witness as to how the other jurors finally voted." (Govt. Br. 2).

No inquiry was addressed to how any other juror voted. The issue here is whether the defense may cross-examine as to how *many* jurors voted for acquittal.

Obviously, suppression of that fact is in no way essential to attain the ends which gave rise to recognition of the privilege.

(c) The Government assumes that *Clark* v. *United States*, 289 U. S. 1, recognized an abstract or group privilege against disclosure of the number of votes each way by a discharged jury. The basic error of the Government and of the courts below seems largely attributable to a failure carefully to consider the exact nature and precisely to define the limitations of the privilege involved.

As stated by Mr. Justice Cardozo, in that case, 289 U. S. 1, 13, the privilege involved "has its origin in inveterate but *vague* tradition and where no attempt has been made either in treatise or in decisions to chart its limits with precision." (Emphasis supplied) The only privilege there assumed, but held there to have taken flight, was "a privilege which protects from impertinent exposure the arguments and ballots of *a juror* while considering his verdict." (Emphasis supplied) *Clark* v. *United States, supra* pp. 13-14.

Obviously it does not invade the privilege of an individual juror as defined in the *Clark* case nor does it encroach upon the purposes underlying the public policy on which the privilege is based to disclose the total vote for acquittal. The cross-examination was not directed to the disclosure of the arguments and ballots of any other juror or identifiable jurors. The secrecy of the ballot is not invaded by announcement of the results of an election.

The absence of any privilege is emphasized by the Government's ingenuous suggestion (Govt. Br. 23, Note 6) as to how the fact that others voted for acquittal should be shown, i.e., by calling each juror. The argument that "each juror could then have claimed or waived, if he saw fit, his privilege not to disclose his manner of voting" high-lights the fact that as against disclosure of the totals of the balloting each such juror had no privilege to assert or waive.

That the Government is arguing for protection of a privilege in no way here invaded is also made plain in the same footnote where it states (Govt. Br. 23, Note 6):

> "Adams had no right to waive the personal privilege of each of the other jurors against disclosure of his vote."

Obviously there was no threat of the disclosure of the vote of any juror.

In any event, it seems clear that even if the privilege is as broad as the Government contends, it was, as Government counsel conceded at the trial, "out the window" once the testimony as to the accused juror's vote went in.

(d) The holding in the *United State* v. *Manton,* 107 F. 2d 844, 845, 846, that a determination of a correct vote by the judge would not, as the defense there contended require acquittal, is now relied upon as demonstrating irrelevance of the vote of the hung jury in this case. This argument signally fails to distinguish between the issue of admissibility of evidence on cross-examination as a plane of reference by which to evaluate direct testimony, and the issue of law whether such evidence, if believed, would require acquittal. No one has ever contended that showing that there were a substantial number of votes for acquittal, would as a matter of law have required acquittal in this trial.

(e) The permitted but inconclusive testimony on cross-examination that certain of LaBranche's fellow jurors changed their vote some time during the trial to which the

Government points as minimizing the error (Govt. Br. 22) fell far short of mitigating the possibility that the jury concluded that Burton was the only juror finally to vote for acquittal.

II.

The argument of the Government as to the exclusion of the grand jury minutes, offered as extrinsic evidence of the bias and interest of Government witness Astorias, fails to distinguish between prior statements of the witness evidencing bias and extrinsic evidence of such bias (See Pet. p. 17).

Regardless of whether the defense has opportunity to, or does in fact, cross-examine the witness on such extrinsic evidence of bias, it is proper to prove his hostility by other means. (Pet. pp. 21-22 and authorities cited).

Notable for its complete lack of supporting citations is the Government's purported distinction of petitioner's authorities (Govt. Br. 25-26) on the ground that petitioner had the opportunity to cross-examine the witness in detail but did not fully avail of this opportunity.

Cursory examination of *United States* v. *Krulewitch*, 145 F. 2d 76, will disclose the lack of support for the distinction the Government attempts to make. There the court held the prior statement competent to contradict the testimony of the witness and emphasized that even though on her cross-examination she had testified it to be false (thus impliedly admitting having made it), such testimony is not the equivalent, or bar to introduction, of the contradictory statement itself.[2]

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[2] This ruling was independent, of course, of the procedural objection, urged by the Government and there overruled by the court, that the accused had not offered the statement in evidence but merely demanded inspection. The court pointed out that because foundation is essential in case of prior contradictory statements, such inspection was necessary to examination for the purpose of laying foundation.

CONCLUSION.

It is respectfully submitted that the record clearly demonstrates the *Clark* case to have been erroneously interpreted and misapplied so unduly to limit cross-examination and prejudice petitioner's right to fair trial as to require the intervention of this Court.

HOMER CUMMINGS,
EDWARD H. MILLER,
JOHN B. HUFFAKER,
Washington, D. C.

HUGH M. WILKINSON,
WARREN O. COLEMAN,
New Orleans, Louisiana,
Counsel for Petitioner.

CUMMINGS, STANLEY, TRUITT & CROSS,
Washington, D. C.,
Of Counsel.